

BULL TROUT RECOVERY UNDER THE ENDANGERED SPECIES ACT

FIELD HEARING

BEFORE THE

SUBCOMMITTEE ON FISHERIES,
WILDLIFE, AND WATER

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON

A REVIEW OF FEDERAL AND STATE EFFORTS TO RECOVER BULL
TROUT (*SALVELINUS CONFLUENTUS*) UNDER THE ENDANGERED SPE-
CIES ACT

AUGUST 26, 2003—BOISE, ID

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BULL TROUT RECOVERY UNDER THE ENDANGERED SPECIES ACT

TUESDAY, AUGUST 26, 2003

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON FISHERIES, WILDLIFE, AND WATER,
Boise, Idaho.

The subcommittee met, pursuant to notice, at 1:30 p.m. in the City Council Chambers, Boise, Idaho, Hon. Michael D. Crapo [chairman of the subcommittee] presiding.

Present: Senator Crapo.

OPENING STATEMENT OF HON. MICHAEL D. CRAPO, U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAPO. This hearing will come to order. This is an official hearing of the Fisheries, Wildlife, and Water Subcommittee of the Environment and Public Works Committee of the U.S. Senate, and the hearing is on the cooperation with States on bull trout recovery under the Endangered Species Act. It is held at the Boise City Council Chambers on August 26, 2003, and it is 1:30 in the afternoon.

I would like to welcome everybody here, and I want to apologize to you at the outset. This is going to be a 2-hour hearing and it's going to end right on the dot because I have to catch an airplane. So I don't know if that's good news or bad news to you, but what it means is I'm going to ask the witnesses to try to stick to your 5 minutes, and I'll kind of if you're going over your 5 minutes wrap the gavel a little bit like that to remind you to wrap it up, because we want to have a lot of time for dialog and each panel has about an hour of time. And, so, your written testimony is already received and will be very thoroughly reviewed not only by me and my staff but by the full committee, and we want to get as much time for give and take in the discussion here.

When we were deciding on the topic of this hearing, to be honest with you, I had my choice of a number of topics of hearings that we could have held this on. And the Fisheries, Wildlife, and Water Subcommittee has jurisdiction over virtually all aspects of the Endangered Species Act, the Clean Water Act, Safe Drinking Water Act, as the title of the committee may suggest, virtually all Federal law dealing with our fisheries and with our wildlife and water throughout the Nation, and there—there was no shortage of topics on which we could hold this hearing. But as I discussed it with my staff and with other senators, with Senator Craig in particular, the issue of bull trout was clearly the topic that we felt that should re-

ceive the focus of this hearing. The reason is because as we approach the question of how we're going to manage the listing of bull trout under the Endangered Species Act, there's a lot of concern, both with regard to what the nature of the listing means, how the Federal Government is going to deal with the questions that arise under the Endangered Species Act, and that is—that question is raised in the context of other issues or other species and other listings in which we have had to face significant conflict in terms of the implementation of the Act.

I've long held that people in the State of Idaho love the State of Idaho, they love the outdoors, they love the environment, they love fish, wildlife, and flora and fauna, and the incredible mountains and rivers and deserts and streams, and the clean air and clean water, and they want to protect it and preserve it. At the same time, they have a real problem with the Endangered Species Act, and again, it's not because they have a problem with protecting the species. That's one of the reasons most of the people live in Idaho is because they love the outdoors and the wildlife. The problem is with the way that the Act is implemented. And we are already seeing concerns with regard to bull trout that could make this one of the most significant issues endangered species wise that we face in the State of Idaho, and as you know, we face some very significant ones already. So it was felt that it would be very appropriate for us to hold this hearing at this point early in the stage, in the process, and try to get a handle on it in terms of congressional oversight and in terms of working with Federal Government, with the appropriate agencies, with the State, and with local officials.

Our purpose here is to ensure sufficient progress toward achieving bull trout recovery; to explore the Fish and Wildlife Service's cooperation with the States in recovery programs; to identify additional opportunities for expanded State roles; to identify how recovery will be measured and determined, and; to identify how to return management authority to the States upon achieving recovery goals.

In my opinion, the way that the bull trout issue is handled, particularly in the State of Idaho, could be a tremendous success and could be a terrible failure, depending on how we address it. And, again, that's one of the reasons that we are approaching this issue in this way by trying to make sure that we bring some attention to it from Congress.

I'd like to recognize the fact that the Service has already returned some management authorities under the Endangered Species Act to the States, and we'd like to see that trend continue. For example, under Section 4(d) of the Endangered Species Act, any take of bull trout consistent with State fishing regulations is exempted from the prohibitions on the ESA, but as long as the person fishing releases the bull trout as soon as it is identified.

Similarly, under Section 6 of the Endangered Species Act, the State of Idaho can issue scientific collecting permits that authorize the take of bull trout, maintaining the State's lead role when managing scientific collecting, and reducing a significant workload for the Service.

In another area under Section 6 of the ESA, the Service has delegated take authority back to the State for fish streams that are in-

stalled in Idaho, greatly reducing the amount of paperwork that the State was otherwise required to complete for each individual stream.

And so there are already some examples of what we would like to see, and that is a very high level of cooperation between the Service and the States as we work on this. And as I indicated, I believe that one of the objectives of this hearing and our oversight of the future will be to assure that we do everything that we can to make sure that we have the kind of delegation of management authority to the State to the maximum extent possible that the law allows.

Today's hearing will be two panels. The first panel will be Dave Allen, the regional director for the Pacific region of the U.S. Fish and Wildlife; Jim Caswell, the director of the Idaho Governor's Office of Species Conservation; and Clive Strong, the Assistant Idaho U.S.—excuse me—the Assistant Idaho Attorney General for natural resources.

Our second panel will be the Honorable Brad Little, he's a State Senator from District 11, also a rancher here in Idaho; Bob Loucks, Lemhi County resident; Jim Riley, who will be replaced by Jane Gorsuch today—ably replaced, I might add. Tell Jim that we will miss him, but we know that you will do an outstanding job, Jane—and Scott Yates, the native fish coordinator for Trout Unlimited.

And with that, I'm going to proceed to the testimony. And following the testimony, we'll engage in some dialog with each panel.

Mr. Allen, would you like to begin?

**STATEMENT OF DAVID ALLEN, DIRECTOR, PACIFIC REGION,
U.S. FISH AND WILDLIFE SERVICE**

Mr. ALLEN. Thank you, Mr. Chairman.

For the record, I'm Dave Allen, regional director for the Pacific region for the U.S. Fish and Wildlife Service. I'm pleased to appear before you today to testify about the current status and—of State and Federal cooperation on bull trout recovery in Idaho, the potential of expanding the cooperation under existing authorities of the Endangered Species Act, and achieving bull trout recovery goals, and returning management authority to the States.

I believe our work on bull trout recovery amply demonstrates the Service's commitment to working with partners every step of the way to achieve locally driven solutions to the problems that have caused bull trout to be listed and threatened throughout its range in the lower 48 States. When the Service started to develop—to develop a recovery plan for bull trout, we established a recovery oversight team consisting of Fish and Wildlife Service biologists, a representative from the State Fish and Wildlife Agencies in each of the four Northwestern States—Idaho, Montana, Oregon, and Washington—and a representative from the Upper Columbia United Tribes.

The recovery oversight team addressed overall recovery issues such as identifying a range-wide recovery strategy, identifying potential recovery units, and providing guidance in developing the recovery plan. To develop local strategies, we established a team for each potential recovery unit. Recovery unit team membership was devised including biologists and experts from local, State, tribal,

and Federal entities, as well as stakeholders representing timber interests, water users, agriculture, power producers, power distributors, landowners, conservation groups, tourism advocates, and local governments.

From the start, the bull trout recovery planning process is built upon previous State and local driven efforts, such as the Idaho bull trout conservation plan and Oregon's plan for watersheds and salmon.

In November 2002, the Service released its draft recovery plan for the Klamath River, Columbia River, and St. Mary-Belly River distinct population segments of bull trout for public comment. Concurrently, we solicited peer review through the Sustainable Ecosystem Institute, the Plum Creek Timber Company, and the Western Division of American Fisheries Scientists. We plan to release the final recovery plan for these bull trout population segments in the fall of 2004. We are also developing a draft recovery plan for Jarbridge River and the coastal Puget Sound segments of bull trout.

Across the Northwest, we are working with other Federal agencies, and State and private parties, to recover bull trout. I'd like to focus on some examples from Idaho:

In the Lemhi area, the Service is working with area landowners and the State of Idaho to develop a habitat conservation plan that will conserve aquatic species and their habitat, while also providing the water uses necessary to the local agricultural economy. The Service is a partner in the Lemhi agreement.

Similarly, in the rest of the Upper Salmon River Basin, we are nearing completion of an enforcement discretion agreement with the State of Idaho and private parties that will result in a conservation plan to provide for long-term protection of bull trout, and provide ESA regulatory certainty to the area ranchers.

We opened an office in Salmon, Idaho, devoted to working with local landowners and watershed groups to address conservation efforts. This was done just recently.

We're working on a safe harbor agreement with four landowners in the Fall Creek area of the Pahsimeroi River watershed.

Under this project, we provided \$400,000 for sprinkler installation and other water conservation measures to reconnect bull trout habitat in a Pahsimeroi River tributary of the main river.

We provided \$440,000 in funding through the Fisheries Resources and Irrigation Management Act to provide for fish screens and passage of water diversion structures.

And, we've also funded numerous fencing and revegetation programs through the Partners for Fish and Wildlife Program.

The Endangered Species Act gives us tools for expanding our cooperative efforts with State, local, and private parties, such as habitat conservation plans and safe harbor agreements under Section 10 of the ESA, grant programs under Section 6 of the Act that recognize the key role of States in wildlife conservation, and special rules for threatened species under Section 4. We intend to use these tools whenever possible.

For example, Section 4(d) of the Endangered Species Act allows for special regulations for threatened, but not endangered, species to match the needs of species and people, as long as these rules

provide the effective conservation results. Using this flexible management feature of the Act, bull trout, while still listed as a threatened species, can be legally taken by anglers in some areas as long as it occurs in a manner that promotes conservation of the species. At the request of Montana, Idaho, Washington, and Oregon, we are currently exploring modification of the existing 4(d) rule to give the States more flexibility in managing bull trout. We will continue to explore options for protecting recovery of bull trout that utilize the authorities of our State and tribal partners.

Mr. Chairman, that concludes my testimony, and I appreciate the opportunity to be here. I'm pleased to answer any questions you have. Thank you.

Senator CRAPO. Thank you very much.

Mr. Caswell, if you would like, you can move your nameplate there and see the timer. Mr. Allen did very well without even having access to seeing it, and I appreciate your doing that.

Please proceed.

STATEMENT OF JAMES L. CASWELL, DIRECTOR, OFFICE OF SPECIES CONSERVATION, OFFICE OF THE GOVERNOR, BOISE, IDAHO

Mr. CASWELL. Good afternoon, Mr. Chairman. Welcome home, and I thank you for the opportunity to testify.

First, I want to congratulate you, Mr. Chairman, on your recent hiring of Committee staff. I understand your new employee brings a wealth of knowledge from his previous job, and furthermore, I've heard it said that most of what he knows he got from his previous supervisor, so—

Senator CRAPO. Well, he told me that.

Mr. CASWELL.—so, you know, Idaho's interest I think will be well-served in the future, and we really do appreciate the work you're doing back there.

My name is Jim Caswell, and I am the administrator for the Governor's Office of Species Conservation. Our office is a part of the executive office of the Governor, much in the same way as the President's Council on Environmental Quality is housed in the executive office of the President. Our job is to develop State policy for listed, soon-to-be-listed species, and to engage landowners and others in species conservation.

In the interest of time, Mr. Chairman, I've submitted extended written comments and I have copies here today, but will focus my oral testimony on the four principal issues that I believe are important to bull trout recovery in particular and to the Endangered Species Act in general.

First, the issue of critical habitat. We believe that the critical habitat designation process that's currently in limbo really does need to move forward and it should continue. But more importantly, the Secretary of the Interior should have discretion if and when critical habitat is to be designated on any listed species in the future. Unfortunately, critical habitat designation has become a litigation quagmire and has commandeered the entire listing program. We support time and designation of critical habitat to the recovery process and not to the listing process.

The second point has to do with DPSs. The distinct population segment for the Columbia River bull trout must be broken down into smaller, more biologically based segments, in order to make recovery achievable. As currently designated, the DPS encompasses the majority of Idaho and Washington, and large portions of Oregon and Montana. It is one of the largest DPSs in the United States. This ruly/unruly designation makes no biological sense, it stalls recovery efforts, and it wastes economic resources. In a bizarre way the Service must agree, because the first step in the recovery planning process was to take this huge DPS and break it down into recovery units. Ultimately, the lumping of healthy and struggling populations in one massive DPS will prevent us from delisting the fish where it's warranted. And a case in point is Idaho's Little Basin. Most folks agree with a little bit more work we can be there; yet, we will be hung up forever because of this huge DPS.

Third point: The Secretary of Interior must commence the 5-year status review for bull trout in order for us to make decisions that are based on new scientific information. As you know, Governor Kempthorne and the entire delegation wrote to the Secretary, requesting such action. Mr. Chairman, we thank you for signing that important letter.

Fourth, and last, we ask Congress to push for and the Service to allow expanded use of cooperative relationships under Section 6. The original framers of the Endangered Species Act recognized the importance of State participation when they crafted the sixth section of the Act. Those who operate delegated environmental programs like the Clean Water Act and the Clean Air Act can attest that there is a greater chance of environmental compliance when the State is brought into the partnership between government and a regulated community.

Idaho maintains that the Federal Government should utilize Section 6 to build relationships, to bring the State's expertise to bear, and to work collaboratively to accomplish the aims of ESA. I know you are very familiar with the Upper Salmon agreement, which can be seen as one example of how Idaho has worked to develop a cooperative Federal partnership.

Mr. Chairman, thank you for holding the hearing in Idaho and for allowing me to comment, and I stand for questions.

[A copy of the letter referenced in the statement follows:]



August 18, 2003

The Honorable Gale Norton
Secretary, U.S. Department of Interior
1849 C Street NW
Washington, D.C. 20240



Dear Secretary Norton:

As you know, the Columbia River Bull Trout population was listed as Threatened under the Endangered Species Act (ESA) on June 10, 1998. The range of this population covers large areas of Idaho, Montana, Oregon, and Washington. Prior to the listing as Threatened, all States had devised recovery programs for the bull trout, and have continued myriad on-the-ground efforts to protect the species. Most recently, the State of Idaho has commented on draft proposals for the federal recovery plan as well as draft critical habitat designations.

Dirk Kempthorne
Governor
700 West Jefferson
Boise, Idaho 83720

As it has been five years since the listing of the fish, we request a formal status review as is required under Section 4 (c) 2 (A) and (B) of the ESA. The need for a status review is particularly timely. Great progress has been made to recover the species in Idaho and other States, and a considerable amount of new information is available on the status of bull trout in Idaho and elsewhere. It is imperative we determine the current status of bull trout as well as determine where to prioritize our future efforts. A status review will greatly assist these efforts.

Larry E. Craig
United States Senator
520 Hart Senate Office Bldg.
Washington, D.C. 20510

We appreciate your attention to this matter.

Mike Crapo
United States Senator
111 Russell Senate Office Bldg.
Washington, D.C. 20510

Sincerely,

Mike Simpson
Member of Congress
1440 Longworth House Office
Bldg.
Washington, D.C. 20515

Dirk Kempthorne
Governor of Idaho

Larry E. Craig
United States Senator

C.L. "Butch" Otter
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1711 Longworth House Office
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Washington, D.C. 20515

Mike Crapo
United States Senator

C.L. "Butch" Otter
Member of Congress

Mike Simpson
Member of Congress

Senator CRAPO. Thank you, Mr. Caswell.
Mr. Strong?

STATEMENT OF CLIVE STRONG, ASSISTANT ATTORNEY GENERAL, IDAHO DEPARTMENT OF NATURAL RESOURCES, BOISE, IDAHO

Mr. STRONG. Mr. Chairman, my name is Clive Strong, I am a Deputy Attorney General for the State of Idaho, and I assume the reason I'm on the panel is that oftentimes I'm at the front of most of the litigation that involves the Endangered Species Act within the State of Idaho. It's from this perspective that I'll speak today. I've submitted written testimony upon which I will rely, but in my

oral comments will focus on some specific comments with regard to the litigation aspect of the issue.

If you look back at the history of the Endangered Species Act as it's been applied, it's been primarily in the context of isolated species that did not have the migratory patterns that we're dealing with with salmon and bull trout. In that context, the approach to enforcement was a Federal regulatory approach. There wasn't much room for State involvement or for local participation. But as the Endangered Species Act has been applied to migratory species, we've seen a significant inefficiency in that approach. What we have found, as you look across the litigation landscape, with the Federal regulatory approach, is more focus on litigation and less focus on conservation and species recovery.

Extremely troubling from the State's perspective as we look at the Klamath and Rio Grande litigations, that millions of dollars being expended on litigation with no real conservation measures being put in place for the species. Instead, transactional costs and process marks the extent of that approach to resolution of the Endangered Species Act problems. In contrast, there's opportunity with the bull trout listing to re-examine the implementation approach for the Endangered Species Act, and to apply the Endangered Species Act as contemplated by Congress.

As both the panelists here with me today have noted, the Endangered Species Act contemplates a greater role than has been provided to the States in the past. In fact, under Section 2 of the Endangered Species Act, it provides the Secretary "shall cooperate to the maximum extent practical with the States," and that "such cooperation shall include consultation with States concerned before acquiring any land or water or interest therein for purposes of conserving any endangered species or threatened species."

This mandate becomes extremely important in the context of migratory aquatic species because we have an intersection between the Endangered Species Act and State water law. If we were to move forward with addressing bull trout in the current Federal enforcement approach context, what we would find is a situation driven by litigation. This litigation would focus primarily on trying to curtail individual water users, with the practical result being no new water for fish because under the prior appropriation doctrine, if water is not being applied to beneficial use by one water user, it's available to next three water users. Consequently, we would end up in a series of cases against a number of different water users.

In contrast, under a cooperative approach such as the Lemhi River Basin, there's an opportunity for addressing water and land resource related issues in a way that accommodates local and State needs, while at the same time providing for the needs of the listed species.

Just briefly, let me describe for you what has occurred within the Lemhi Basin. Rather than pursuing the litigation alternative, the State was able from to convince the National Marine Fisheries Service to cooperate with the State and local water users to look at the resource problems within the Lemhi River Basin. One of the major challenges to the salmon recovery in that basin has been a dewatering situation occurring in the Lower Lemhi. We have

worked with the water users to devise a water rental system in which the Legislature has authorized creation of a instream flow and a water rental program that allows the rental of water to provide the instream flow. By doing this, we've been able to preserve the benefits to the local economy, while at the same time providing the flows necessary for the migration of both juvenile and adult salmon within the Lemhi basin.

By bringing the parties to the table, it's fostering an atmosphere of trust and the opportunity to explore creative solutions. Through the initial conservation agreements, we've been able to move now toward development of a long-term conservation plan that includes the Fish and Wildlife Service and the NOAA Fisheries, and provides for considering listed salmon as well as listed bull trout as well. The plan will provide for the needs of all listed species, while at the same time protecting the local economy.

What I believe the Lemhi example demonstrates is that while it's easy to come in and to mandate a solution, it's difficult to actually implement the solution without local cooperation; and particularly in the context of bull trout where water and land management are going to be the key issues that must be addressed in devising a solution. It's going to be important to have the stakeholders at the table; and in that regard, the State is in a unique position to be able to provide leadership, primarily because we have local managers who have relationships with local water users and landowners. These relationships can provide the opportunities for discussions that will be beneficial to listed species as well as the economy.

Thank you, Senator.

Senator CRAPO. Thank you very much. Were you finished? You can conclude.

Mr. STRONG. I will conclude with that, thank you.

Senator CRAPO. All right.

Mr. Allen, the first question I have is for you, and it's just a detail. Do you know what the status is of the Upper Salmon agreement? And the reason I ask is it's my understanding from the Governor's office that a final draft has been printed. Are you aware of where we are on that final agreement?

Mr. ALLEN. I had a conversation with Jim Caswell yesterday, and as I understand, it's awaiting some sort of signal back from the IT staffperson who's been working on it and as well as the National Fisheries Service. I wasn't able to follow up yesterday, but I'm assuming that that's imminent. I'm not aware that there's any housecleaning issues.

Senator CRAPO. Mr. Caswell.

Mr. CASWELL. Mr. Chairman, I don't know if there's any outstanding issues either. I've tried to contact folks twice in the last couple weeks; in fact, I sent another note today, e-mail, asking—inquiring about the status. And I think tomorrow I'll see the Fish and Wildlife Service rep, so maybe I'll get a chance to talk to him face to face.

Senator CRAPO. OK. Good. Well, obviously that's something that from the testimony that each of you provided, as well as from the information I have, that's a very important development that we'd

like to see become a model for the way that we handle some of these issues in the future.

I'll come back and start out again with you, Mr. Allen, but for the whole panel, if I'm discussing something with one of you and you have a thought or clarification if you would like to pitch in, please feel free to do so. I'd like this to be a true discussion.

In the draft recovery plan, it states that the bull trout are well distributed throughout most of the unit and present in all core areas, and a number of people have come to me and asked if the species is that broadly dispersed and present in all core areas, how does that result in a listing of the species in the first place? Can you explain a little bit of how the listing—why the listing decision was made?

Mr. ALLEN. Well, I wasn't personally involved in this decision. I was—had been in Alaska the last 11 years; I just joined this part of the country.

Senator CRAPO. That is a bit of an unfair question then.

Mr. ALLEN. In general terms what I can tell you is obviously there's the basic four-factor examination that's done that looks at threats, it looks at management measures that are underway, it looks at whatever data is available on both abundance and distribution. I can only assume that the conclusions that were drawn from all that information and there are different population segments that were examined separately to draw those conclusions, and that ultimately when they were looking at the last population segment, they decided to lump them into a range-wide threatened status. But those are generally the criteria that are looked at.

I think it's well-known that in some parts of the country the bull trout—some parts of its range, the bull trout is doing fairly well, but they are spotty, and for whatever reason, they have not met threshold that would have allowed us to come to a determination of not warranted.

Senator CRAPO. Well, that raises another question to me, and I'm probably not going to ask this in the most effective way because I don't know the right terminology, but if we have a very broad range designated for the habitat or in this case probably the critical habitat—because it's my understanding that a significant amount of the bull trout range was designated as critical habitat. Let me just ask: Is that correct?

Mr. ALLEN. Well, we haven't concluded the critical habitat. Senator Crapo. So that designation has not been made?

Mr. ALLEN. It has not been made yet, no, sir.

Senator CRAPO. Maybe the designation hasn't been made, but there's been discussion or proposal in the draft recovery plan or something to that effect. Somewhere in my mind is that there's a broad part, a big part of the range is proposed, at least, as critical habitat?

Mr. ALLEN. Yes. A proposal was put out for public review. That whole process has been, you may be aware, has been suspended due to lack of funding in the Agency. I work on critical habitat determinations.

Senator CRAPO. Mr. Caswell raised in his testimony.

Mr. ALLEN. Right. Unless something extraordinary happens in the next 30 days, we will pick that process up again starting October 1st, and conclude it—

Senator CRAPO. As soon as you run out of money again?

Mr. ALLEN. Well, hopefully we'll get this one done before we do.

Senator CRAPO. I say that somewhat with tongue in cheek sarcastically, because I know very well the problem you're dealing with. In fact, I want to get into that problem a little bit.

But the question I'm driving at right now is that if we have a significant part of a very large range proposed as critical habitat and yet it's also acknowledged that there are—well, going back to the phrases, that the trout are well distributed throughout most of the unit and present in all core areas, the question that comes to my mind is if we have a listed trout and if we end up with critical habitat designated over very broad ranges which also include areas where there are significant amounts of the trout—in other words, the trout is doing well in some of those areas—what does that mean for the areas where the trout is doing well? If the trout is doing well in an area that is designated as critical habitat, do the folks who live in that area face the same kind of restrictions and management regimes as would those who live in areas where the trout is not doing as well?

Mr. ALLEN. Not necessarily. And one of the benefits, as I mentioned in my testimony, when a species is listed as threatened, there are some flexible management opportunities that are available to us under special rules. You mentioned yourself the existing rule that's in place that is somewhat restrictive, but we are responding presently to a very recent request in the last 3 weeks from the States of Washington, Oregon, Idaho, and Montana, to see if we can't make that rule more flexible and actually allow some take by anglers, not just simply, you know, return them if they happen to take them while they're fishing for other things. This is possible as long as we can draft an agreement with the State that will allow for those in certain circumstances and that there are conservation benefits. I mean, that's what the law asks us to do when we apply this particular rule associated with that.

So it's something that we're looking very seriously at, more flexibility in that rule, possibly opening up some of those areas in the State of Idaho. Right now there are two States that are most interested in this—Montana and Idaho—in areas that we may be able to identify opportunities for more flexible management regimes that will include the appropriate conservation measures.

Senator CRAPO. Well, thank you. While we're on critical habitat, let's expand into the full discussion of it, and I'd like to have the whole panel respond to some of these questions. But the first question I have is what is the practical impact of the Service's decision to simply stop critical habitat work because of their problems in terms of the budget in Washington and the litigations and stresses that are placed? I mean, if we just stop dealing with critical habitat designation, what does that mean in a case like this with the bull trout?

Mr. CASWELL. Mr. Chairman, the short answer is confusion and uncertainty. A little longer answer is an example that I have.

I was on a management review here about a month ago, and we were visiting a timber sale on national forest land, 11 miles upstream of the Weiser River, which in the proposal is designated as a migratory area, hasn't seen a documented bull trout in 30 years. And we were going through a—they were going through a full-blown consultation on a half a million feet of harvest, all the roads had been built, full-in fish buffer strips were applied to all the drainages. There was only one live stream and it is 11 miles from the Weiser River. And because this proposal is out there and in limbo, not completed, the powers that be in terms of the biologists that were involved in this but in the Forest Service were treating it like it was already a done deal, No. 1; and, No. 2, you know, because of that uncertainty just sitting there and not getting completed and a final decision rendered on whether that is going to be called migratory or it's not going to be called migratory, they felt they had to go through this process in order to protect themselves.

Senator CRAPO. So are you saying that we had a situation sort of like we sometimes see under the Wilderness Act where we have a wilderness study area, but it's managed as if it were wilderness? Here we have a proposed designation of critical habitat that is very broad, and until that proposal is made final or somehow withdrawn or changed, it is functioning as the de facto designation, at least in this case.

Mr. ALLEN. And I'm not disputing that. That may be very well how other people in the field are doing it. It shouldn't be the case. It is listed. We would have to do the consultation anyway, regardless of the critical habitat designation or not.

But the fact that such a draft document is out there probably does have some influence over how people examine that particular issue and that location. It is information that has not been fully vetted yet, but it is out there for people to use at their discretion, but it certainly isn't something that we, as an agency, would be advocating that they ought to be using draft documents to assess their consultation requirements.

Senator CRAPO. So they would have to do the consultation even if there were no designation of critical habitat.

Mr. CASWELL. I disagree with that, Mr. Chairman. I'll tell you why:

This is not an area that has bull trout presence, and that's documented, so—

Senator CRAPO. I see.

Mr. CASWELL.—so the issue of critical habitat designation is—gets back to if they're present, it's one thing, but if it's critically designated, then whether the fish is there or not, you have to protect that habitat, so it does have to go through consultation.

Senator CRAPO. I see. I see your point.

And you would probably agree with that, Mr. Allen?

Mr. ALLEN. Yeah, obviously if that is, indeed, the case that this area was determined that there's no presence, then there may be a no effective determination in terms of the consultation, right.

Senator CRAPO. All right. I think that everybody on the panel is probably aware that I've proposed legislation in Washington on this issue to basically change the timing of the designation of critical

habitat to the recovery phase rather than the listing phase, which is what Mr. Caswell proposed just now.

Mr. Allen, do you support that?

Mr. ALLEN. Our agency has consistently supported that view for quite some time now.

Senator CRAPO. In fact, I think that's true under both—

Mr. ALLEN. Both the previous administration and this one as well, yes, sir.

Senator CRAPO. Mr. Strong, do you have an opinion on that?

Mr. STRONG. I would simply concur. It makes a lot more sense at that point in time when you have information to make a designation. When you do the listing decision, you really don't have the information to make an appropriate designation. What it leads to is overinclusion.

Senator CRAPO. Well, I can tell you that this is one of those issues in Washington where we seem to have agreement from both Republican and Democrat administrations, and from many different quarters, but we still seem to face those who would like to filibuster such a bill or would threaten stalling it in some way because they don't want to see the Endangered Species Act fixed or amended in any way. But we're pushing on that to see if we can provide at least that piece of a solution for this part of the problem.

Let me come back. I'm going to change—change gears here again, entirely. I want to talk about Section 6. My understanding from all of your testimony, as well as testimony that we received in other contexts, is that Section 6 is potentially a very valuable tool that to this point has not been utilized as fully as it should have been. I'd like to see what each of your comments, each of your positions, is on that in general.

And, second, if you could in your response, help list for me some specific examples. You've already done that but I'd like you to do it again and maybe fill it out a little more, some specific examples of how Section 6 can be useful to us in terms of more effectively managing and delegating responsibility to the States and providing flexibility to all interested parties under the Endangered Species Act. I guess if you want to start, Mr. Allen.

Mr. ALLEN. Sure. Be happy to.

For years, Section 6 has really not been very—very actively funded nationally. Very, very small amount of money had been available and provided to States to participate in a variety of activities in connection with listed species. Clearly, the Section 6 provisions of the Act are, as I've indicated in my testimony, are meant to recognize the key role that States play in resource management, and we simply, as an agency, really haven't exploited that to any great degree for not only reasons of funding, but also I think at least in the past questions about how far we could take those provisions.

This is a very—this is a very rapidly evolving policy issue within the Department right now as we speak. There's very serious considerations being given to see if we can't, through enhanced funding in Section 6 grants, provide more authorities to the—to the State management agencies to carry out management provisions associated with listed species. And I'm—I'm anticipating myself that, quite frankly, we will be receiving some new guidance here in the very near future in this regard.

As for specific examples, you did mention the one here in Idaho that I guess a couple years ago we provided through a Section 6 agreement the ability of the State of Idaho to install fish screens in conjunction with water diversion projects and provide the State coverage in the process of doing that.

So clearly, the mechanism is there. It's just a matter of making sure that there will be adequate funding to expand those opportunities, and also make sure that we craft those agreements in such a way that they withstand scrutiny, because I know you're very much aware, we have a lot of people looking over our shoulders with regard to any actions that we take that would, in effect, delegate some of our authorities.

Senator CRAPO. Thank you. And before we go on, Mr. Caswell, when you talked about lack of funding, is that budget allocation within the Agency or is that funding available by the Agency providing that funding?

Mr. ALLEN. Funding requests, Mr. Chairman. It has been increased in recent years. I don't have the numbers right in front of me. But clearly once again, in recognition that there may be additional opportunities out there that we hadn't fully pursued.

Senator CRAPO. OK. Mr. Caswell.

Mr. CASWELL. The only thing I could add, Mr. Chairman, is—and I agreed with what Mr. Allen said, but we think that there's even a lot broader net that can be cast under the language in Section 6, and I mean, like a whole program. And maybe this is a little bit bizarre, but let's take just the bull trout as an example.

You know, we have healthy, robust populations throughout the State of Idaho. I mean, not every drainage, not everywhere, but it is really in good shape, all things considered. And Governor Batt went way far down the road at trying to pull together a plan for the State of Idaho prelisting. You know, there was inventories done, there was watershed groups that were working. I mean, this thing was really mature, and a lot of good information was gathered.

Why isn't the State of Idaho, through the Department of Fish and Game Section 6 program, managing bull trout in the State, the whole program? Just give it to us. Let us do that.

Senator CRAPO. Mr. Allen, do you believe that that's possible to delegate that broadly under Section 6?

Mr. ALLEN. I really don't know. I know that the whole issue of these types of—I mean, Jim's—Mr. Caswell's—proposal is certainly something that has been discussed in at least in concept not in specificity, how far can we really go with these delegations. As I indicated, I know that there is a lot of interest within this administration to expand that as far as we can legally. And, personally, I very much support the idea of engaging the State to the maximum extent that we can under the law, and I'm certainly willing to entertain those types of proposals once it's clear exactly what kind of constraints we may still have to operate under.

Senator CRAPO. Before we go to Mr. Strong, keep your mike, because you indicated that you expect some new guidance to be coming along. Is that guidance from within the Fish and Wildlife Service, or are we talking CEQ or—

Mr. ALLEN. Within the Department.

Senator CRAPO. What about the other agencies? Is the Council on Environmental Quality engaged on this?

Mr. ALLEN. I don't know that for sure, but I know that this issue has been at the heart of some of the provisions of the Snake River Basin adjudication, and clearly there must—I know that NOAA Fish has been—has been part of those discussions, and I'm sure Clive Strong probably has as well. But, I think, yeah, some of these ideas of expanded authorities have at least generated how we might go about implementing some provisions of that agreement.

Senator CRAPO. Just a quick comment and then we'll go to you, Mr. Strong.

Yesterday we had a summit—not a hearing but a summit—right here in this room with regard to grazing, and one of the things that we talked about was the fact that different agencies at the Federal level have their own handbooks and their own guidances and so forth on how they implement the Endangered Species Act, which creates duplication, at least, if not worse problems. And it seems to me that on something as important as delegation under Section 6, that it might be very helpful if all of the Federal agencies were operating under the same guidance, and if that guidance was one that was as expansive as possible. So take that back to whatever channels you have and route it through, and I'll route it myself.

Mr. Strong, could you please comment?

Mr. STRONG. Mr. Chairman, Section 6 has been a largely unused provision of the Endangered Species Act. To the extent it has been used in the past, it's been primarily for research and gathering permits for State Fish and Wildlife Agencies. But reading the section itself though, it provides for a much broader program. In fact, it really is equivalent to the Clean Water Act or RCRA which provides for delegation of enforcement to States.

Having said that, in my mind, Section 6 provides the only real opportunity for addressing these types of migratory species recovery plans. If we are going to be effective in implementation of these programs, as I noted in my opening comments, we're going to have to have a basin-wide approach to achieving recovery, and that takes into account impacts of decisions on water deliveries and other land use practices.

The State is in a unique position to be able to provide that opportunity, as I demonstrated, through the stream flow legislation and water bank created for the Lemhi. Those are opportunities that would not otherwise be available in the normal context of an ESA implementation program, but through Section 6 we can create opportunities through cooperation with local entities.

Having said that though, the Lemhi model, while it represents in my mind the only real solution for these kind of issues, it does ultimately come down to a funding issue. For example, right now, one of the issues at the forefront of bull trout recovery is the objective of Fish and Wildlife Service to address fragmentation of habitat. That essentially requires a reconnection of tributary streams. Right now in the Lemhi Basin if we had access to just a million dollars of funding, we could complete reconnection of a drainage basin; but instead, that funding is not available. What we see is funding being directed to litigation that's occurring in other States, the Rio Grande and Klamath being the prime examples.

There's going to have to be a change in the Federal priorities in terms of funding and availability of streamline processes if we are going to be effective in implementation of the Endangered Species Act. Section 6 provides that opportunity.

We're already somewhat down the road in that direction, because for the last 2 years the Idaho Department of Fish and Game has had a bull trout conservation program approved by the Fish and Wildlife Service under Section 6 in which we have done screening and habitat improvement projects. By all accounts, that program is working effectively. So the framework is already in place; it's simply a change of the mind-set of the agencies.

You made note of the need for the agencies to have common operating centers. That's a very important problem, because in the past, the only agency that's really been willing to use—at least in the Northwest—Section 6 extensively is the Fish and Wildlife Service. NOAA Fisheries has had a policy against use of Section 6. It's only with the current administration that there's been a change in philosophy. So I think it's important that the agencies do come together and develop common criteria for the use of Section 6.

I think the concerns about delegation are really misguided, because in large part, Section 6 has its own control mechanisms. First, we have to have a program that's approved by the agencies. Second, it provides for annual review of that program to ensure proper implementation is occurring. And, three, by doing it on an annual basis, it accommodates adaptive management, which is so essential in many of these ESA issues because in many instances, we just don't have enough scientific certainty to make longer-term plans. We're going to have to do adaptive management programs as we go along. All of this can be accommodated through Section 6.

Senator CRAPO. Clive, with regard to NOAA Fisheries, are they—you indicated that they had changed somewhat or to some extent with the current administration. Are they working today in an adequate sense, in your opinion, with regard to the, I guess, expansive designation or delegation of authority under Section 6?

Mr. STRONG. Mr. Chairman, the proof is in the pudding, so to speak, as we move along. I think there are going to be some opportunities with the Upper Salmon River plan, and the Lemhi Basin, where the State is going to want to move down the road to a Section 6 approach. We'll get an opportunity over the next few months to find out.

Senator CRAPO. Do we have any Section 6 delegations from NOAA Fisheries?

Mr. ALLEN. Not at the present time, Mr. Chairman.

Senator CRAPO. And we only have the one from Fish and Wildlife Service?

Mr. ALLEN. One that I know of.

Senator CRAPO. There may be others?

Mr. STRONG. Mr. Chairman, we have the overall limited Section 6 agreement with the Fish and Game Department that a subset of that is the bull trout—

Senator CRAPO. Right.

Mr. STRONG.—conservation plan.

Senator CRAPO. Again, a question for anybody on the panel: Is Section 6 limited simply to delegation to the States? And what I'm asking is can Section 6 be used in a flexible way with a county or some other entity?

Mr. ALLEN. My limited knowledge is that it is a provision primarily for us to engage—engage the States, and I'm not aware that it can be expanded beyond that. Again, my experience base is very limited in its application.

Mr. STRONG. Mr. Chairman, I think the primary contemplation was delegation to the State, but there's nothing within Section 6 that precludes a State, through a cooperative program with local counties and governments, to include them in the State planning process. It's more of an approach or a mechanism we use, but delegation does come down through the State.

Senator CRAPO. So the—the Upper Salmon agreement is with the State of Idaho?

Mr. STRONG. Mr. Chairman, that's the current direction is to do it through the State of Idaho but with local cooperation.

Senator CRAPO. Are there—let me ask, and I should have this here, but does anybody have the operative language of Section 6 in front of them there?

Mr. ALLEN. I've got—

Senator CRAPO. Somebody in the audience?

If you could, just read it.

Mr. ALLEN. All right.

Senator CRAPO. I do have it up here, but go ahead and read it.

Mr. ALLEN. OK.

General Carrying out the program authorized by this Act, the Secretary shall cooperate to the maximum extent practical with the States. Such cooperation shall include consultation with the States concerned before acquiring any land or water or interest therein for the purpose of conserving any endangered or threatened species.

And then it goes on and talks about management agreements, co-operative agreements.

Senator CRAPO. Right, and then it gets kind of extensive. Let me just read some of the language here. The first sentence, it says: Cooperate to the maximum extent practical.

And then Paragraph B, it says: The Secretary may enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened species.

To me, that seems pretty broad, and the same thing with regard to cooperative agreements. So I think one of the things that we need to take out of this hearing is the fact that we need to accelerate, if possible, the utilization of Section 6 by all Federal agencies, and I want to thank the Fish and Wildlife Service for, from what I understand, being involved in moving down that road for some time and helping us in that context.

Did you have something you were going to say, Clive?

Mr. STRONG. Mr. Chairman, I was going to draw your attention to Section 2 of the Endangered Species Act, and it provides: "It is further declared to be the policy of the Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues and conservation of endangered species."

It was this language about local agencies that I was focusing on and I think provides at least an opportunity for inclusion of them as part of the State program.

Senator CRAPO. Yeah, I see no legitimate argument under Section 6 that the local agencies—how is it stated here—yeah, the local agencies—couldn't be included under a State plan. From what I saw of the part of Section 6 that I just read there, I didn't see any specific authorization beyond the State. But I also believe Section 2 seems to contemplate full cooperation with the local agencies, and I'm just curious as to whether there is these circumstances when it would be appropriate and possible for cooperation with the county or with some other local agency to achieve an objective under the Endangered Species Act. Right now I'm just trying to identify the waterfront here to see what kind of flexibility we may have.

Mr. CASWELL. Mr. Chairman, I would submit that we have that in place as well, and I think the Lemhi and the Upper Salmon watershed—

Senator CRAPO. That's what I was thinking about.

Mr. CASWELL.—folks that are working together is an example of that.

I think another example down in Bear Lake, we now have a group of irrigators and local folks, particularly with our Fish and Game Department and the Fish and Wildlife Service, that have come together. They're working on similar issues in Saint Charles Creek, Fish Haven Creek: How do we get water back in the stream and still irrigate the crops, get the fish back up there to spawn. So it's starting to happen in various places around the State.

Up north in Bonners, which is a similar sort of group of folks that were formed that brought up some of these issues and started to work at the local level, and so I think it's on the cutting edge.

Senator CRAPO. Well, good. I've got two more questions of this panel and one is actually a question for you, Mr. Caswell, and that is in a broad sense on this issue of Federal cooperation with and delegation of authority to and working with the States, and this isn't limited just to the Fish and Wildlife Service, but do you feel that the various Federal agencies that you have to work with under the Endangered Species Act in Idaho are making an adequate effort at being sufficiently cooperative with the State?

Mr. CASWELL. Fish and Wildlife Service, absolutely. We have good relationships with folks that work in this office, work diligently together on issues, trying to find some new ground, plow some new furrows to get some things done in a little different way, willing to take some risks and think about things.

The story is not the same with NMFS, however, and it's just a lot tougher to work with NOAA. And I think that's starting to change some. I think the attitude is different now, but they have some policies in place that are just really, really hard to deal with.

Senator CRAPO. Well, you can choose not to answer this question if you want to, but I'm going to ask it:

In terms of your experience with NOAA Fisheries, is it because of policy and handbooks and directives that their employees have to work under, or is it an attitude in the agency that is not performing with the administration's policies?

Mr. CASWELL. Some of both.

Senator CRAPO. OK. Fair answer.

The last question I have is we've talked about Section 6 and I think it carries a tremendous amount of attention to solving some serious problems in terms of the stresses that we face under the Endangered Species Act. Could you each just quickly go through if you are aware of any other—and there are others like safe harbor agreements and so forth—but other tools that we may have under the Endangered Species Act to achieve flexibility both in terms of delegation to the States, but also just flexibility in management and in our ability to try to relieve some of the process and administrative burdens and get to the real activity of species conservation that we want to achieve under the Act? What are the other areas or tools that we might try to focus on as we look at these issues?

Mr. ALLEN. Well, I'll start with for years the Service tried to exercise discretion on listing critical habitat, but our experience in recent years has shown that that discretion has caused us nothing but heartburn in adjudications.

But getting back to, you know, what are some of the provisions of the Act that, you know, do allow us to work more effectively with, for example, the States and other interested parties, I have mentioned them. I think they are important in that. Some of them are relatively new in concept. They did emerge out of the last administration of some attempt to make the Act more user-friendly in the—in the midst of anyone's ability to change some of the provisions of the Act, and they are such things as:

Have to have conservation agreements, and working with private landowners to come up with realistic agreements that would allow development activities to go forward while assuring that adequate conservation measures were in place, and provide those landowners with instant protection.

Safe harbor agreements are particularly interesting to individuals who voluntarily step forward and indicate on their private lands if they have an endangered species, their willingness to voluntarily do things of benefit to the species, and in exchange for that, of course, some assurances that no additional requirements will be imposed on them.

I mentioned the (4)(d) rule provisions of the Act. That—only for threatened species, not for those that are listed as endangered, but for threatened species, the ability to exercise some flexible management for the purposes of allowing in the case of a sport fish the ability for anglers to actually take some of those as long as an overall program of conservation can be demonstrated in the midst of while they are listed.

Section 6, of course, we've talked at length about that.

Obviously, you know, the recovery planning process is intended to fully engage, you know, State management agencies and interested parties to help participate in the specific recovery actions, and, again, that opens the door for other opportunities for cooperation.

But that is, you know—that's just about the landscape that is currently available to us, and I think that from my perspective what's happened, in some areas we have done a very good job of really exploiting those opportunities. In others, we could do more.

And it is a—it is a bag of tools that also carries with it the burden that some of it requires some additional resources to make them most effective; but, clearly, I have been extraordinarily impressed with what I have seen in the energy and the willingness on the part of Fish and Wildlife Service personnel to engage and explore these opportunities across the landscape; and not just in Idaho, in other parts of the region that I have responsibility for. Fortunately, in my last 11 years in Alaska, we didn't have to deal too much with endangered species. We had a few, but this is somewhat new territory for me, but I'm really quite pleased to see what progress we have made, and I said the willingness on the part of Fish and Wildlife Service employees to reach out and work with local—local communities and local interests. It's just that like anything else, there is a limit in what we can—what we can accomplish. Thank you.

HEARING OFFICER: Thank you, Mr. Allen. And by the way, I want to welcome you here to our region of the world, and I'm pleased to hear the record from Mr. Caswell that the Fish and Wildlife Service is good to work with in terms of their willingness to delegate and work with the State. Thank you.

Mr. Caswell, do you have anything to add to that?

Mr. CASWELL. I've got three notions but only one of them really applies to the Act as it sits today, and that is the whole issue of science and the adequate science, and it seems to me that there's a real opportunity to open that door a lot wider and walk through it with a larger group of people on the listing side. And I know you probably could probably argue about this a long time, but, I mean, the idea of State scientists involved in academics, private people that get involved in looking at the science, a lot broader cabinet of people that are looking at the final listing decision, and I think that's doable within current language in the Act.

The other two things I want to mention—this came up a little bit yesterday—the counterpart regulations that are out now for consultation on public land, it just blew my mind when I finally realized that really all we're talking about are fire projects. So we went through all of that rulemaking process at the Federal level, only to cover those projects that are involved in fire. The other thousand decisions that are made on a daily basis that could have gone the same way don't, aren't. So we're still wrapped up in red tape over consultation on Federal projects.

And the last one is the notion of power of authorities, and this would need legislation, I believe, but it still seems like, to me, that a test case could be well put together in the Lemhi and Upper Salmon where infrastructure exists, tribes are involved, all the agencies are there, you've got a track record, it's positive. And so for just recovery of fish, why don't we turn those people loose and turn off the regulatory and bureaucratic tap of all the paperwork and let them try this for a while? I mean, they have still got to go through project development and all those things that happen, but why do we have to reconsult, why do we have to do NEPA all over again, and on every project, every time? Why couldn't we unshackle those people and monitor that progress, do oversight on that, do it for a limited period of time, and see if it works and see what the benefits are compared to the other way?

Senator CRAPO. Points, Mr. Strong?

Mr. STRONG. Just one tool that hasn't been mentioned, but I think it's become a fairly important tool in the arsenal dealing with these ESA issues, and that's prosecutorial discretion. Oftentimes, these ESA issues come up in kind of a crisis situation and you need to bring people to the table fairly quickly, and to go through the normal ESA process, it's just too time-consuming. And so what worked out is a process whereby commitments can be made and then agreement reached with the Services to have prosecutorial discretion and not to move forward while we move toward the implementation of the longer term plan.

Senator CRAPO. OK. There's a lot more we could go through but we're a few minutes over already, and so I want to thank this panel, and sincerely appreciate your willingness to give the attention to these issues that you do, and we will continue to work with you on these issues. Thank you very much.

I'd like to call up our second panel at this point, and again, that panel is Mr. Brad Little, who's a State Senator from District 11; Mr. Bob Loucks, Lemhi rancher from Salmon, Idaho; and Ms. Jane Gorsuch, executive director—

What is your title, Jane?

Ms. GORSUCH. Vice president of Idaho affairs.

Senator CRAPO.—all right, of the Intermountain Forest Association; and Scott Yates, native fish coordinator of Trout Unlimited. We'd like to welcome all of you. We have four people and three chairs.

All right. I'd like to thank you all for coming as well, and again remind you to try to stick to your 5 minutes to speak. And, Senator Little, let's start with you.

STATEMENT OF HON. BRAD LITTLE, AN IDAHO STATE SENATOR FROM DISTRICT 11, EMMETT, IDAHO, ON BEHALF OF RANCHERS' INTERESTS

Senator LITTLE. Thank you, Mr. Chairman. We're very thankful that you're having the hearing here in Idaho. We—we country folk know that there's not very many Members of the Congress or the Senate that have as good of knowledge of particularly water as you do, and we are very thankful that you elected to take this on as a cause, because it has a big impact on us in Idaho.

Senator CRAPO. Thank you.

Senator LITTLE. I represent Gem and Canyon County. Gem County, of course, has got—used to have a forest base, and Canyon County definitely has an irrigation base. And I also ranch in bull trout habitat.

I've had a little experience with the Endangered Species Act. I had a forest allotment that I kind of sauntered away from after salmon were introduced, wolves were introduced, and the cost of regulation got so high that we just kind of gave up. My goal here today is to not have my neighbors and constituents suffer the same fate as my family.

There's already significant costs that exist out there. As alluded to in the earlier panel, they talked about—and I think you did, Mr. Chairman—about what could come down the road in these recovery plans. Boise Cascade Corporation, which has almost a quarter mil-

lion acres of feed ground in the State of Idaho, as everyone knows, has shut down their timber operations in Idaho. The net result of that is a million dollars a year into perpetuity that will cost the schoolchildren in the State of Idaho in deferred revenue that exists. Just the threat of bull trout and the regulations that exist out there has been a significant cost on timber operations, and farming and ranching operation.

A bigger cost may be that 200,000 acres and what happens if Boise elects to dispose of those properties. They have already disposed of some of them. And I think all the people that are involved, I think all the original authors of the Endangered Species Act, had in no way the intent that the production of timber and fiber and food would move offshore to places where it's not sustainable, it's not regulated, and that habitat would be fragmented. I know that's kind of the 30,000-foot view of the Endangered Species Act, but I think we need to talk about it. In my district alone, 500 jobs were lost as a result of that transition of Boise Cascade.

One of the issues that they talked about before in the earlier panel is that critical habitat designation, and Squaw Creek in Gem County is one of those areas where we've got some good habitat up in the upper reaches up on the forest, and then you come down through these small meadows not unlike the Lemhi area, and then it goes into Black Canyon Reservoir, and that tie-in to Black Canyon Reservoir to those upper forest areas is a real problem. You know, the farmers and ranchers that I talked to are very concerned about what's going to happen if they have to put in fish passage facilities, screens. What's the cost of that. And as one of them said, the Federal Government is pretty good at chumming us into one of these programs. Then you have a change of administration and President Howard Dean appoints Katie McGinty Secretary of Interior and secretarial discretion doesn't look so good at that point in time. So I think in your deliberations about changes to the Endangered Species Act, you want to keep that in mind.

And, of course, the issue of adequate sustainable funding is very important. What happens if the funding goes away? That hasn't been a very good excuse in court for not complying with certain provisions of the Endangered Species Act, and the people that I've talked to out in the field are very concerned about the ramifications of that.

One of the things that's really important to us is that you have a concrete goal. The real estate that we're sitting on here today, the dirt that we're sitting on, probably came from up Boise River at Mores Creek, and in the 1850's, that area was dredged and redredged and redredged and redredged. Now they are talking about critical habitat up there where there may have been a couple bull trout seen. You can imagine that those landowners, if they'd have thought that critical designation of bull trout with all the expenses and costs would have come around, that that transformation of just an absolute desert wasteland in the upper reaches of Mores Creek never would have occurred. And it is quite amazing what nature has the capability to do, but the threat of going from a warm-water biota and to a cold-water biota and having the bull trout designation exists in everyone's mind. The rancher that's got riparian habitat, if that area improves and all of a sudden he's going to become

bull trout susceptible, it's not a very good incentive for him to do the things that we all agree that they should do.

Mr. Chairman, we shouldn't fear those consequences of good management, and I was hoping that somebody in the last panel was going to throw out the magic pill that was going to take care of that. I have great faith in you and your capabilities. There really is a quandary for this warm-water, cold-water biota problem that exists with bull trout, and it is a disincentive. We need concrete goalposts that we know that when we get there, we've reached recovery and we can go on. But my people in my area are very, very nervous.

I also concur with the last panel about local control. I was joking with my local Fish and Wildlife Service that I was going to testify that we wanted to leave all the control at the Federal level and not have any control here, and that was going to be my standard response, but my experience has been—

Senator CRAPO. You just don't want to pay for it. Right? Senator Little. Oh, I've been found out, Mr. Chairman.

But, frankly, there's a lot we can do at the local area. You know, we're going through the TMDL process. One of the frustrating things is the BURP analysis that DEQ does is somewhat different than the riparian habitat condition indexes that the Federal agencies use, and I've asked many times what the correlation is and I get not very good answers back. And it's too bad that we have to measure water quality four or five different ways, and that's part of the frustration that my constituents have.

Give us achievable goals; give us guarantees of adequate, sustainable funding; reduce the paperwork; and allow the experts to get out of the office and out from under the litigation and paperwork barriers that they have, and get them out and help some of the people that, for the most part, you know, like I said, we had wolves and they're thinking what's the next species, why should we do this, because we know if we meet that hurdle there will be another species that comes down, and that's a real frustration to my people.

Thank you, Mr. Chairman.

Senator CRAPO. Thank you, Senator.

Mr. Loucks?

**STATEMENT OF BOB LOUCKS, LEMHI RANCHER, SALMON,
IDAHO**

Mr. LOUCKS. Thank you, Senator, for inviting me to testify. I'd like to correct something: I'm not a rancher in the Lemhi Basin. I raised a few horses, but I'm an animal scientist by training, and I was the County Agent at Salmon for over 30 years, and I've been involved in Endangered Species issues for many years.

Senator CRAPO. All right.

Mr. LOUCKS. The first thing I'd like to say is we don't understand why bull trout were listed in the Salmon River Basin. Going directly to the Federal Fish and Wildlife documents, they're proposing about 8,900 stream miles for critical bull trout habitat in Idaho. About 53 percent of that is in the Salmon River Basin. Now, we'd understand this if we were short of bull trout, but we're not short of bull trout. According to the document which they put out,

there are two subpopulations of bull trout within the basin. Neither population is at risk of stochastic extirpation. Now, I think in plain English, what that means is that bull trout are not endangered in the Salmon River Basin.

The second thing that they reported in their document is the magnitude of threats is considered low in this basin. And, again, in plain English, I think that means bull trout are not threatened in the basin.

There are, according to the document, 125 known local populations in the Salmon River Basin. Now, I want you to understand that a local population does not mean a population in a stream. In the Lemhi River, for example, which is part of the Salmon River Basin, there are six local populations. So I counted the streams in which bull trout are known to occur, and there are 31 streams just in the Lemhi Basin in which bull trout are known to be resident.

So you can play all kinds of number games with this, but I think every fish biologist who has ever looked at bull trout in that basin, Federal Fish and Wildlife, Fish and Game, Forest Service, BLM, all of them would tell you we are not short of bull trout. And so we don't understand how you can list 14,000 square miles as critical habitat when there is—they're not at risk and they're not endangered. I'm just lost. I'm befuddled by how they reach that conclusion.

Second, I was asked to address status of landowner recovery efforts. I've been part of the Salmon Basin working group and the Lemhi Basin working group since their inception. For the most part, private landowners have actually led the effort on fish recovery. The original working group on endangered—they weren't endangered; they weren't even listed at the time—the original working group was formed by the Lemhi Soil and Water Conservation District, the Lemhi Irrigation District, Water District 74, and the Idaho Department of Fish and Game put together a working group in 1989 to look at what private landowners could do to help anadromous fish. OK? They were not listed, there was nothing going on, but the ranchers, the private citizens, felt like they could do something good, and there's been a lot of effort by the State and by the private landowners put into recovery efforts in that basin, Lemhi Basin particularly.

One of the problems that you have in dealing with the Endangered Species Act is—maybe it's kind of a side bar effect and Senator Little would be very familiar with this—as soon as a species is listed or proposed for listing, the management becomes extremely conservative by the Federal agencies, and by that I mean the Forest Service and BLM, and so they put restrictions on use of public land that make it uneconomical to operate, which is exactly what Senator Little alluded to. And very specifically, if you are so unfortunate as to have a pasture in your allotment that has bull trout, you will not graze that after November 15—or, no, September 15th. If you are so unlucky to have a pasture that has salmon, you will not graze that after August 15th. So you can get in a situation where all of a sudden, what was a viable grazing operation doesn't fit in with the private land at all.

And I should point out that in the—in the Upper Salmon River Basin, the bulk of the salmon habitat is on private property. So in

the Lemhi—in Lemhi County, for example, only 8 percent of the county is private. Ninety-five percent of the salmon habitat in the county is on that 8 percent of the ground. So what we do with that other 92 percent of Federal habitat has a huge influence on what happens on private ground.

OK, I would like to—have I got 2 seconds or 3 seconds?

Senator CRAPO. Sure. We'll give you two.

Mr. LOUCKS. OK. I think the private landowners and the organized private groups are almost unanimous: They would rather develop an Idaho conservation plan under Section 6 and deal through the State, than to try to deal with all of the Federal agencies privately.

And the final thing that I have to say is that the Salmon Basin goals listed in the bull trout recovery plan are so amorphous, they just have no form to them, and subject to adaptive management, that it is unlikely that they will ever be reached. We don't understand how you can take a species that really isn't endangered and do all of these things, and all of a sudden, it isn't endangered. Very difficult concept for us to grasp.

Thank you.

Senator CRAPO. Thank you.

Ms. Gorsuch?

**STATEMENT OF JANE GORSUCH, VICE PRESIDENT OF IDAHO
AFFAIRS, INTERMOUNTAIN FOREST ASSOCIATION**

Ms. GORSUCH. Mr. Chairman, my name is Jane Gorsuch, and I'm the vice president of Idaho affairs for the Intermountain Forest Association. And our association is an organization of wood products manufacturers, forest and land owners, and related businesses. And what we try to do is to work in collaboration, cooperation with others to develop and implement solution-oriented policies aimed at securing a stable and sustainable timber supply for our members. And I want to thank you and your staff for the opportunity to provide testimony to the subcommittee today, and to echo Senator Little's appreciation of your coming here and spending your time and your efforts with your knowledge base on this issue. It is a hugely important issue for our State.

I would like to reiterate that our association and many of our members, all the way down to the ground-pounding foresters, have been involved in the statewide conservation efforts under former Governor Phil Batt to work out on-the-ground resolutions and solutions of conservation measures and the bull trout conservation planning process. Many thousands of hours of time have been dedicated by our companies and our individuals in local communities working on the basin advisory groups, the watershed advisory groups, and the technical advisory groups, and the end product of that or the goal for our association members was to come up with a viable plan where the State could manage conservation and recovery process, if necessary, for bull trout. And when the listing was made, there was a deep sense of disillusionment and sadness that the listing was not only made, but that all of the work that had been done seemed to go into a black hole and didn't surface again for some time. And what happened within our association of members was that almost a lack of interest in working on on-the-

ground working groups to further that effort because they felt that it was out of their hands. We were, however, heartened by the creation of the Office of Species Conservation at the State level, and that has had our full support for many years, about as many years as it's been around and even before it has been around, because we viewed that as an additional opportunity for the State to control its destiny as far as a listing and prelisting of threatened and endangered species.

The going by the wayside of the conservation plan shifted our focus toward more of one of finding ways to protect our members who own a great deal of forest land in the State of Idaho. As Senator Little mentioned, one of our member companies, Boise Corporation, owns about 200,000 acres here in South Idaho, and my members represent one of the largest forest land owning groups in the northern part of the State, and they have been very concerned, particularly for those who have listed bull trout habitat, as to what measures would then be necessary to be taken, and it does color their decisions on what they buy and where they buy and what they dispose of and how they manage their property.

They also sent us as their staff with the association, to look for ways to work within the Endangered Species Act to address the issues of incidental take in the otherwise legal operations of their properties, as well as looking at things like safe harbor agreements.

So we set about looking at what is in the Endangered Species Act that would provide some opportunity. We diligently did our work and came up with several ideas. With the help of one of your now-staff members, started looking down the pathways, looking at habitat conservation plans, and looking at around the country at how those have been utilized and how they have been done.

One of our member companies at the time, Plum Creek Timber, had spent 2 years and over \$2 million in the development of their habitat conservation plan which spanned three States and multiple species. Most of our folks aren't that large and don't have those kind of resources, and most of the forest landowners in Idaho, particularly the nonindustrial products, don't have anywhere near those resources to commit.

So what we did was to start looking at other ways of providing an opportunity for those folks who don't have those large resources to enter into a cooperative agreement with the State or the Federal Government or both, we would hope, to provide an opportunity for forest landowners in Idaho to help the Federal Government reach its goal of recovery of listed species. And I think it's important to state every time I can that that is a Federal goal. When a species is listed, the non-Federal entities do not have the goal of "recovery," their goal is to avoid take. That is a very different goal. It is a very different legal goal, and I know that you know this difference, but many people tend to not understand the difference.

So one of the ways that we were looking for was a way to incentivise our landowners or forest landowners into entering into agreements with the Federal Government or through a State program that they could seek protections from incidental take and provide safe harbor assurances or some type of compliance assurances in an effort to help the Federal Government reach its recovery goal.

Most of our members were doing those things already. Once the listing was made, however, they backed away from it because it was a disincentive to continue to improve habitat and introduce fish.

So we have been working on a more general program to be administered by the State, because we think that that would bring more people in, but that would provide these types of comprehensive assurances. I can't go into it further because it's under a confidentiality agreement at the present time ordered by a Court; however, it does do the things that, as we like to say, make fish and wildlife happy and provide homes for fish and wildlife. At the same time, it would allow our forest managers to do the things on their land that are otherwise lawful, and to help reach the—help the Federal Government reach its goal of recovery plans—recovering species while of providing our members to utilize the resources that they have invested in their forest lands.

Mr. Chairman, I thank you again for the opportunity to come before you and the committee and subcommittee, and I would stand for any questions that you may have.

Senator CRAPO. Thank you very much, Ms. Gorsuch.

Mr. Yates?

**STATEMENT OF SCOTT YATES, DIRECTOR, IDAHO WATER
OFFICE, TROUT UNLIMITED, BOISE, IDAHO**

Mr. YATES. Mr. Chairman, my name is Scott Yates. I have worn a number of hats at Trout Unlimited in the last 6 years. I am former director of our native trout program West-wide.

Currently, we opened an office in Idaho Falls about a year and a half ago, and I serve as director of our Idaho water office, which is a new program for us. And we've got offices in Montana, Colorado, Utah, and Wyoming to focus on stream flow issues, with the point being to establish State-based programs based on State-type issues and State-type approaches. So with that in mind, I'd like to jump in.

I've submitted a bunch of testimony, but I'd just like to focus on a couple things in my oral testimony. First, in terms of the bull trout status, we're a relative newcomer in places like the Upper Salmon. We're looking forward to working with folks, and one of our big goals is to actually work with landowners and some of the groups that are already established and well established, I might add, in working on these issues.

From Trout Unlimited's standpoint, I want to really emphasize the importance of protecting the migratory life history of these bull trout. I think in doing so there are really two issues in the Upper Salmon River Basin, and one I want to point out because I think it's a really good example in the West—in fact, one of the best examples in the West—of cooperative work between the Federal and State government, and it's been talked about today already, and that is the fish screening efforts that have gone on in the Upper Salmon. I think you will find that example is used as a model in other States; it certainly is with our other field offices like in Nevada and California as a really good way to approach that very important issue, which is folks like Mike Larkin with the IF&G who have established a ground-based protocol. It doesn't just identify

problems, but works with landowners to identify solutions to those problems, and I think that's really important.

The second issue with the migratory fish I think is a little more difficult one and I think it's a difficult one West-wide, not just in Idaho, and that is the dewatering issues that are prevalent in areas like the Upper Salmon. It's not just the Upper Salmon. I think there are additional places, like the Bear River system and the Upper Snake system. We have those issues statewide. In terms of bull trout though, the Upper Salmon water issues are obviously high, are the high-profile issue there, and the Little Lost system as well.

What we've done so far in the first few months of this broad program is try to identify some areas where we can partner with the agencies and with landowners. I'd like to talk about two systems in particular, the Pahsimeroi drainage in the Upper Salmon, and then the Little Lost system.

In the Pahsimeroi, we've got a long-term partnership that was established earlier this spring with the Bureau of Land Management, which is part of a bring back the natives program, funded through the National Fish and Wildlife Foundation. In the Pahsimeroi, it's a long-term, large-scale watershed restoration strategy to address some of those dewatering issues and channel reconnect issues that are really prevalent in most—in fact, all—of the tributaries that drain out of the south side of the Lemhi into the Pahsimeroi River drainage. The first creek we've identified for project emphasis is Falls Creek, and it was mentioned earlier today as well. I just want to mention a couple things about Falls Creek.

We're looking forward to the partnership, but in terms of our role, it's working with the BLM on the actual technical issues associated with once we do have water back in that stream, reconnecting Falls Creek down to Big Spring Creek and eventually into Pahsimeroi River. But just to explain the complexity of these reconnect issues, there's a number of agencies that have been working on it a lot. Trout Unlimited you know, but the Fish and Wildlife Service has been working with the landowners on funding for the irrigation modernization of the project. We know the NRCS has been very active in the engineering and design of that system. We know that Department of Water Resource is involved in terms of the water rights analysis of the Falls Creek drainage. And so it's just from the standpoint of collaboration and communications, these are really very complex processes with a lot of different people involved.

Second, from a funding standpoint, obviously these are not going to be cheap. For Falls Creek we know that Fish and Wildlife Service has already put forth about \$400,000. We know that our stream channel reconnect will be expensive. We're not sure what it's going to cost yet, but I do know that I've already signed on to pay about \$70,000 in technical engineering design for that project. So they are very expensive.

And, finally, in terms of implementation, they're very complex. Those are stream channels that have not had water for over a century. So in terms of putting water back in, it's not automatic that it's going to make it down to where we want it to go.

And so those are long-term issues that are not just for Falls Creek but also other streams in the Pahsimeroi and probably other streams in the Upper Salmon Basin. But we're looking forward to that type of project. The reason we're really looking forward to it is these are large-scale restoration strategies. And I've dealt with the Columbia River Basin for about 6 years now on various issues and we have tended to nickel and dime, not as much in the last half a decade but before that, on various techno fixes, things that aren't long-term.

In the Pahsimeroi drainage in the Upper Salmon, identifying flow issues and working with landowners to fix these problems, will go a long way for both the species and I think long-term for the rural landowners and communities, and I think that's important. These are permanent fixes once they are done.

And just to move over to the Little Lost, I really wanted to touch on the Little Lost because I think it's a unique opportunity. It was mentioned today already by Mr. Caswell as an area where we have the opportunity to actually finish what we need to get done regarding bull trout recovery.

We are currently partnering with the agencies to finish up the final touches on a irrigation structure inventory and assessment to identify the final barriers on the main stem of the Little Lost system, and we've also identified a couple willing landowners who want to sit down and design some sort of strategy in terms of irrigation modernization to try and get water back in a couple of important bull trout spawning tributaries in that system, and I think by working through those issues and maybe a couple of key land areas, I think we're going to be able to recover Lost River bull trout if we can just get an influx of funding.

And my last point—I know my time is done—is to mention how I think groups like TU who are taking a field-based approach to get out and know some of these landowners, know the issues, we can help I think in terms of raising funds and try to get these projects done. It's certainly the goal of our program and part of our long-term approach in the State of Idaho.

And so in summary, I appreciate the opportunity to come and talk to you about our approach, and we look forward to working with folks on bull trout recovery issues.

Senator CRAPO. Thank you very much, Mr. Yates.

And I'd like to start out this panel with a question which relates to the discussion we had of the previous panel on Section 6, and I think that we probably addressed that pretty thoroughly back there, but I just want to make sure that I check with each member of this panel to see if there's any disagreement with the notion that we should expansively utilize Section 6 of the Endangered Species Act to get more delegation of authority to act in this area to the States. Anybody on the panel disagree with that?

Senator LITTLE. Of course.

Mr. LOUCKS. I don't disagree with that, Senator, but what I want to say is from a private landowner's perspective, we can't write a conservation agreement through the State just dealing with one species. We've already invested, as private landowners and as agency representatives, over 4 years in the effort to write a Lemhi conservation plan that National Marine Fisheries Service and Fed-

eral Fish and Wildlife can sign off on. But if we have to write that one species at a time, none of us are ever going to live long enough to give any protection to landowners.

At the meeting in Salmon, you may remember, I really believe we can get this done, but I really believe that there's got to be some administrative push on the agencies to get them to come together to make this agreement. If every time we reach part of the agreement it's open for renegotiation, we're never going to get finished. That's just not the way private people do business.

Senator CRAPO. So are you talking about more of a watershed agreement that would cover all species?

Mr. LOUCKS. Cover all fish species.

Senator CRAPO. Cover all fish species. OK. Good.

Mr. Yates, I want to first of all thank Trout Unlimited. I think that they are working very effectively and well with private landowners and with the State and Federal agencies to try to help us make progress here, and I want to just first of all say that I appreciate that.

One of the questions that I have—and this is probably an unfair question to you, so if you can't answer it I'm not going to hold you responsible or whatever—but there are a number of environmental organizations out there. I mean, the number is very large, and some are more litigious, some are more involved in working on projects like Trout Unlimited is, and so forth.

But do you think that Trout Unlimited has the ability to gather support from other interested environmental organizations and have them work with you on the types of endeavors that you've described to us today?

Mr. YATES. Well, I think we do. I think our history in this State—this is really the first—we've got a field presence in this State for the first time. We've operated in Idaho out of Portland and other places in the past, but I think we have a field presence here now in terms of being on the ground.

Senator CRAPO. Yes.

Mr. YATES. We have a tradition of working collaboratively. We have active chapters all through the State. You know, we have seven or eight chapters, 1,900 members in local areas. And we've got a history of working with people like the Idaho Department of Fish and Game on restoration projects. And in terms of working with the other groups, I think over time, I think we will have that ability, probably not all groups, but we're already, in fact, partnered with groups like the Wood River Land Trust, The Nature Conservancy and other folks, not only in places like the Big Wood River Basin but the Upper Snake, and working, you know, also in a ground-based way with those groups. I think we can do that.

Senator CRAPO. Well, I appreciate that, and I realize that was kind of a little bit of an unfair question to ask you, but I really think it's important, the work that you're doing, and to the extent that you are able to work with other groups to accomplish an even broader alliance in that context, I think it's very helpful.

One question that I did want to address for a minute or have the panel address is the one that Bob Loucks raised with regard to why were the bull trout listed in the first place, and maybe, Mr. Yates, I ought to come back to you since you're with Trout Unlimited. I

honestly don't know the answer and it's because I'm not close enough to the science and everything else to know, but there were some real questions raised because I think there was an effort to evaluate this twice and there is this evidence that it's, in many parts of the proposed area of critical habitat, there are very stable and large populations. Do you know why the listing was made?

Mr. YATES. Well, I'll tell you, I listened to Mr. Allen earlier. I feel for the Service's dilemma in the Section 4 listing process with salmonids. It is an extraordinarily difficult issue in terms of how you break these species down by species and subspecies.

We know the importance of local populations and the adaptations of those local populations in very specific areas. That varies across the board with salmonids. Whether it's, you know, just looking at cutthroat or bull trout, it's a very distinct process and, you know, I understand the difficulty in grouping a species like the bull trout into a broad Columbia River Basin DPS and I understand why that doesn't make much, from a common sense standpoint.

At the same time, I look at a place like the Upper Salmon and I'm not going to dispute Bob who's lived up there for a long time and knows where a lot of those fish are. But it's hard for me to understand when you look at places like the Pahsimeroi and the Lemhi, that are truly disconnected from the main stem and where there's flow issues both in the main stem and the tributaries, that you don't just look at those, even though you might have healthy tributary population, like four to eight miles of fairly good Federal habitat, that that population is not at risk. I think there are enough of those issues in the Upper Salmon that it's a problem.

Now, I fully understand that there are also strongholds for bull trout in Idaho, very good strongholds in the middle part of the Salmon River, for instance, in northern part of the State. Frankly, I was not really prepared to address that. I was going to focus on on-the-ground issues; and we're going to continue to do that. We're going to put the listing issue aside and just work on the ground to fix some of the problems we know we have.

Senator CRAPO. Well, you've been very good to field a couple of tough questions, and I appreciate that. I appreciate it very much.

You know, we talked about Section 6 a lot with the last panel. Another potentially helpful tool which, as some of you have discussed, is the habitat conservation plan which authorities in the Endangered Species Act as well, but we have run into some—as we've tried to expand the availability of habitat conservation plans, we've run into some opposition from landowners and other user groups to the concept, and I think that, to a certain extent, arises out of a lack of trust and just what it will be used for and how it will be utilized by the agencies. But I would like to get an input from the three of you who represent here, in my view, sort of land-owner interests as to what you think of the viability of habitat conservation plans as a flexibility tool.

Jane?

Ms. GORSUCH. I think, Senator, that's a very good question, because we've been around that discussion issue now for fully five or 6 years, and our membership has discussed it and cussed it up and down, both ways.

I think we've reached a point where everyone in our organization understands the utility of it, and—but they have concerns over the process. And if we can go back to the Plum Creek permit, that cost \$2 million, minimal. That's the down side of the cost. And they basically had to write their own documents, NEPA documents, and hold hearings. They went through the whole thing and it took over 2 years to do.

Most private forest landowners don't have those resources to do it. They don't have the scientists, they don't have the hydrologists, don't have the fisheries biologists. They don't even have foresters in some cases, the small privates. So they don't feel technically qualified, so they have to go outside and hire a consultant to do them. So there's a huge cost, there's a time commitment, and even after all of that, they reach the adaptive management section which seems that the Federal services must have in there, and they are uncomfortable with that. And that's what we've dealt with internally with our discussion with our members and others.

And we've gone to other hearings that have preceded this one just on HCPs where people have come in from other States and said, well, we have this horrible experience with an HCP, and adaptive management seemed to be one of the issues. I think overall, there is just a feeling among most private landowners that they're being blackmailed into entering into an HCP. I think once you get past that issue, then you can look at the utility of having an agreement of some kind where the landowner who probably would do these things to enhance habitat and protect fish, they probably would do that anyway, but if they can get an assurance that they will not have the Federal Government come in and sue them for take, then they can have some sort of a safe harbor agreement that they're not going to come back in later that, oh, by the way, you forgot this.

Senator CRAPO. And that's the adaptive management provision you're talking about.

Ms. GORSUCH. Part of it can be, but it's more like a safe harbor agreement where if you do this set of things for this length of time, we will give you—these are all things that will enhance the habitat or introduce the fish, reintroduce the fish—we will protect you, we will help protect you from third-party lawsuits, because those, unfortunately, do happen.

And so they look at that, and then they look at the adaptive management. What if 10 years from now under this agreement some new type of management comes along, I think the Federal services want to have the opportunity to revisit that. That's my view of the adaptive measures.

The last issue is funding. It's just cost. It's total dollars. Who's going to pay for it and how are we going to implement it? Who's going to pay for these things that we have to do under this agreement? And that's where Federal funding is absolutely critical, funding from somewhere else besides the landowner.

Senator CRAPO. Right. Thank you.

Mr. Loucks, Mr. Little, do you want to add anything to that on HCPs?

Mr. LOUCKS. I think Ms. Gorsuch is exactly right. There are approximately 400 private landowners in the Lemhi Basin, at least

that many have water rights, not counting the city of Salmon, and none of those people have the funding to develop a habitat conservation plan. We would be dead in the water in the Lemhi Basin today had it not been for the good efforts of the State of Idaho.

And I'd particularly like to recognize Clive Strong. Clive has definitely been a leader in trying to help us work into some form of legal assurance that we're not going to get whapped when we're trying to do good things.

There's no protection from third-party lawsuits no matter what happens. Anyone can sue you under the Endangered Species Act at any time. But it's been our feeling that at least if the State government was behind us and we could draft some kind of conservation plan that the Federal agencies would sign off on, that at least when you ended up in court, the biologists from those agencies would stand up before the judge and say these people are trying to do what's right.

And, frankly, 90 percent of the landowners do want to do what's right. There's a small percentage you can't deal with, and so as a private group, you just ignore those. If they do something that actually results in a takings, then they probably should be thrapped.

Senator LITTLE. Well, of course, I think—I think James commented on cost, and of course for the smaller landowners the expertise is a problem, but it does beg the issue of a concrete goal, a concrete goal line that hopefully doesn't move. Now, the adaptive management part of it cuts both ways as far as moving that goal line.

But I think one of the other things that we've got that's pending is the implementation of TMDLs. You know, Congress giveth the Endangered Species Act, Congress giveth the Clean Water Act, and occasionally they don't meet in the middle all the time, and one of the reasons that people might be a little reluctant is that they want to make darn sure that anything in an HCP minimizes the cost of TMDL compliance rather than exacerbates that situation.

But—and one of the other problems with a habitat conservation plan if you've got anadromous fish is you've got two different agencies that you've got to work with there, plus the other agencies that exist. But it's mainly cost, but whenever the benefit of that long-term goal offsets those other costs, but there's not very many people that are going down that avenue.

Senator CRAPO. All right. Well, you know, by the way, TMDLs was one of the other topics that was proposed for this hearing. We, like I said at the outset, we have no shortage of topics that we could have covered here, and I understand the dynamics there.

You know, I was looking around to see if

Clive Strong was still here, because in his testimony, he mentioned something about enforcement discretion as a simpler alternative to HCPs, and I'm not quite sure—I should have explored that with him in a little bit more detail.

Bob, do you understand what he was talking about?

Mr. LOUCKS. Yes, I do, Senator. What we're operating under in the Lemhi Basin right now is called a letter of prosecutorial discretion. In the—the Lemhi agreement has been in process for four—over 4 years now, and each year, we've had a meeting with the agencies Federal Fish and Wildlife and National Marine Fisheries

Service, and we have explored what has happened to date and what we propose for the next year. And what we're trying to do is work out what we propose in the long-term so that we can get some kind of coverage under the ESA—takings coverage—that will last for 25 or 30 years. But what we've been working under is this letter of prosecutorial discretion, and what that says is that if you do the things that you say you will do in your plan and that if a take of a listed species occurs while you're doing otherwise lawful things within that plan, that the agency will not prosecute you. That still doesn't protect you from a third-party lawsuit.

Senator CRAPO. Right.

Mr. LOUCKS. But it does say the agency recognizes that you're trying to reach this habitat recovery goal, and that this is an incremental thing and doesn't happen over night, and so if you're doing these things, we're going to suggest to our law enforcement people that they leave you alone.

Senator CRAPO. Under the HCP, do you have protection from third-party—

Mr. LOUCKS. You never have protection from third-party lawsuits.

Senator CRAPO. So this letter of prosecutorial discretion seems like another tool that we ought to investigate very thoroughly as we try to find flexibility under the Endangered Species Act.

Let me just ask you—I just looked out the doorway and I see TV cameras out there, and so that means that I'm going to have to quit even a little sooner and I apologize for that, but let me ask you, obviously, I'm looking for tools here. We've gone through Section 6, habitat conservation plans, we've talked about safe harbor agreements, letters of prosecutorial discretion. We've talked about just the efforts of private parties and interest groups like Trout Unlimited working with the local folks and putting together projects and working to try to achieve objectives. I'd like to just have the panel tell me if there's any other tools out there that you're aware of that we ought to be exploring, because one of the things we want to do with this oversight hearing is then try to provide some momentum on some of these tools through the agencies and see if we can't get them implemented as we move into this bull trout issue.

Senator LITTLE. Money.

Senator CRAPO. Money. I should have listed money. That was—for some reason that comes up as an answer to every question I ask these days, but it's a legitimate answer, and I'll take that as another tool. I'll write it down on my list here.

Ms. GORSUCH. Senator, I would second some of the ideas that came up from the first panel. I think it was Mr. Caswell. And this is something that we've experienced in our efforts on several fronts, not just bull trout, but the Federal services need to have an attitude, I think, of acceptance toward scientists other than their own and scientific data other than their own. It needs to be viewed as on the same level as Federal scientists. The State and private folks have quite good science in many cases, and to the extent that sort of a sea change in attitude could be conducted, that that would be helpful. And I think that's one of the things that I took from what Mr. Caswell was saying.

And the pilot authorities idea was a good one too. I think that that one does take legislation, but there's been legislation on a lot of things. But under pilot authorities—going way back from the early—the first one I was involved in was in 1986 on Federal land uses, so there's some good ideas in there and I think I would second that idea.

Third, funding is always very useful in trying to implement anything on the ground.

The last thing I would say is we would look at overall umbrella-type agreements or voluntary enrollment agreements that cover interested participants once it's in place. A statewide effort that could serve as a model, maybe as a pilot, but if it were agreed to by the Federal services for one State for, say, bull trout, that private entities could enroll under that. And that's something that has been a vision of ours for some time and we're working toward that, and I'm not sure that it's shared by our friends in the Federal services, particularly given that we have agreements under the Plum Creek arrangement that they continually want to revisit and go further.

Senator CRAPO. Right.

Ms. GORSUCH. And so our view is if it's good enough for that, why isn't it good enough for State-wide voluntary type of agreements. And I think to the extent that that could be incorporated into your deliberations and that of the committee, it would be helpful.

Thank you again for the opportunity.

Senator CRAPO. Thank you.

Mr. YATES. I think one more tool that we've talked around is nontraditional partnerships, and in Idaho, I think that is very important. Maybe, you know, groups like Trout Unlimited who are able to maybe cover some of the ground. I've worked with agency folks all over the West and this State has got some of the best, especially the field biologists I tell you we work with in the field are fantastic, and they generally have a very good relationship with landowners, but they can't cover all the ground. And I think there's a role for groups who can provide some help in that regard either working directly with the landowners on funding issues, on project development issues, and then coordinating that project with the agencies where folks are comfortable.

Senator CRAPO. Well, I appreciate that, you know. And, again, some of you were here yesterday, but we had a similar discussion in the context of grazing yesterday and we covered the waterfront in some senses because we talked about all kinds of problems with trying to get all the agencies working off the same page and so forth, and it seems to me that some of these tools that we were talking about—well, one of the tools that came up yesterday was to avoid a listing, which we tried to do with bull trout, but everything from working to try to avoid the listings to working to give delegation to the State and prosecutorial discretion and safe harbors and habitat conservation plans and everything else. These are ways that, it seems to me, you get more flexibility and more common sense under the application of the Act. And I can assure you that as we deliberate over this as a full committee, it's something that not only the full committee chairman Senator Inhofe and myself as the subcommittee chairman are very concerned about, but

many of the Senators are. The Endangered Species Act is beginning to be felt nationwide the way we've felt it here in the West for a long time.

And so I would encourage you all, not only those on the panel but those here in the audience, to submit to me if there's something you didn't get to say today or an idea that comes up afterwards or an observation, or those of you that were on the panel if you have a suggestion or an observation, I would encourage you to submit it to us, because we're very serious about this oversight. And we do have an administration at this point that we believe will listen to us and will work with us, and that's something that we should take advantage of.

In fact, one of the things that I'm going to do is go back to Jim Connaughton at the Council on Environmental Quality and tell him that he ought to get one manual for all the agencies, and, second, that he ought to have a guidance come out to all the agencies from the White House that tells them how to expansively use Section 6 and maybe some of these other tools that we've talked about.

So we are going to work on this at the agency level, but we are also going to look at efforts to try to change the law in terms of maybe changing the timing of critical habitat designation or some of the other things we need to do.

So again, I thank you for your attention to this issue. I thank those of you who have given your time to come here today. I know you've got plenty of other things to do with your time. It's been very helpful to me.

I apologize: Usually what I like to do after a hearing is visit and make sure I meet everybody who took the time to come here, but because of my travel schedule, I'm going to have to hit the gavel and go out there.

And I think that camera is for me. If it's not, I'll be fine and go right on to the airplane. And if the camera is for one of you, I will leave it for you.

But, again, I want to thank everybody. I apologize that I won't have time following the hearing to stop and shake hands and visit a little bit, but we'll try to do that another time.

And unless there is anything further—oh, I did want to make one other announcement, I sort of just said it, and that is that we're going to leave the record open for written comments, and that applies not only to the witnesses but to anybody who is here today who would like to submit some written comments. And I encourage it, because we sincerely—we're developing an action plan on this and we're going to implement, so we look for your help.

Without anything further, this hearing is adjourned. Thank you very much.

[Whereupon, at 3:28 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

[Additional statements submitted for the record follow:]

STATEMENT OF DAVE ALLEN, REGIONAL DIRECTOR, U.S. FISH AND WILDLIFE SERVICE

Mr. Chairman and Members of the Subcommittee, I am Dave Allen, Regional Director of the Pacific Region of the U.S. Fish and Wildlife Service (Service) in the Department of the Interior. I am pleased to appear before you today to testify about the current status of State and Federal cooperation on bull trout recovery in Idaho; the potential of expanding that cooperation under existing authorities of the Endan-

gered Species Act (ESA); and achieving bull trout recovery goals and returning management authority to the States.

The mission of the Service is working with others to conserve, protect and enhance fish, wildlife and plants and their habitats for the continuing benefit of the American people. In carrying out this mission, the Service takes great interest in working with States, tribes, private landowners and others. I believe our work on bull trout recovery amply demonstrates this commitment. The Service is working with partners every step of the way to achieve locally driven solutions to the problems that have caused bull trout to be listed as threatened throughout its range in the lower 48 States.

Let me first provide some background on our recovery planning efforts, which I believe illustrates our commitment. When the Service started to develop a recovery plan for bull trout, we established a Recovery Oversight Team consisting of Fish and Wildlife Service biologists, a representative from State fish and wildlife agencies in each of the four northwestern States Idaho, Montana, Oregon and Washington and a representative from the Upper Columbia United Tribes. This tribal group includes the Confederated Tribes of the Colville Reservation, the Coeur d'Alene Tribe, the Kalispel Tribe, the Kootenai Tribe of Idaho and the Spokane Tribe.

The Recovery Oversight Team addressed overall recovery issues such as identifying a range-wide recovery strategy, identifying potential recovery units, and providing guidance in developing the recovery plan. To develop local strategies, we established a team for each potential unit, consisting of people with technical expertise in various aspects of bull trout biology in that specific area. These technical experts came from State and Federal agencies, tribes, and industry and interest groups.

From the start, the bull trout recovery planning process has built upon previous State and locally driven efforts, such as Idaho's Bull Trout Conservation Plan and Oregon's Plan for Watersheds and Salmon. Recovery Team membership was diverse, including biologists and experts in related disciplines from local, State, tribal and Federal entities; stakeholder groups representing timber interests, water users, agriculture, power producers and distributors; landowners; conservation groups; tourism advocates; and local governments.

In November 2002, the Service released its draft recovery plan for the Klamath River, Columbia River, and St. Mary-Belly River distinct population segments (DPS) of bull trout. This was followed by a total of 150 days of public comment. Concurrently, we solicited peer review through the Sustainable Ecosystems Institute, Plum Creek Timber Company, and the Western Division of the American Fisheries Society. We subsequently received peer review comments referred by the Western Division of the American Fisheries Society and representing the comments of four independent fishery scientists. We are working with the recovery team to integrate both public and peer review comments, as well as additional new information, into the draft plan. We plan to release the final recovery plan for these bull trout population segments in the fall of 2004. We are also developing draft recovery plans for Jarbridge River and Coastal-Puget Sound population segments of bull trout.

Across the four northwestern States, we are working with other Federal agencies and State and private parties to recover bull trout. Let me focus on some examples from Idaho:

- In the Lemhi area, the Service is working with area landowners to develop a habitat conservation plan that will conserve aquatic species and their habitat while also providing for water uses necessary to the local agricultural economy. The Service is a partner in the Lemhi agreement.
- In the Upper Salmon River Basin, we are coordinating with the State and private parties to develop a cooperative agreement that will provide for long-term protection of bull trout.
- Recognizing that we needed staff dedicated wholly to conservation efforts in the Upper Salmon River Basin, we funded a position and opened an office in Salmon, Idaho. This office is devoted to working with local landowners and watershed groups to address conservation efforts, including the Upper Salmon agreement, the Lemhi agreement, the Falls Creek Safe Harbor Agreement, the Upper Salmon Watershed project technical team, the Upper Subbasin Planning technical team, the Partners for Fish and Wildlife Program, and implementation of the Fisheries Resource and Irrigation Management Act.
- We are working on a Safe Harbor agreement with four landowners in the Falls Creek area of the Pahsimeroi River watershed.
- We provided \$400,000 for sprinkler installation and other water conservation measures to reconnect bull trout habitat in a Pahsimeroi River tributary with the main river.

- To benefit bull trout conservation, we provided \$440,000 in funding, through the Fisheries Resource and Irrigation Management Act, for fish screens and passage at water diversion structures.
- We have funded numerous fencing and re-vegetation programs through the Partners for Fish and Wildlife Program.

Additionally, we have worked with public and private parties across the four States to achieve bull trout conservation agreements that will benefit the species and our conservation partners. These include the Plum Creek Native Fish Habitat Conservation Plan (HCP), which covers 1.6 million acres of timberland in Idaho, Montana and Washington, and the Washington Department of Natural Resources HCP, covering 2 million acres of timberland in Washington. Those are two of the many examples.

The ESA gives us tools for expanding our cooperative efforts with State, local and private parties such as Habitat Conservation Plans and Safe Harbor Agreements under Section 10 of the ESA and grant programs under Section 6 of the Act. We intend to use these tools whenever possible.

We expect the recovery of bull trout to be a dynamic process occurring over time. Our draft recovery objectives are based on the best available information. For the final plan, we will refine these objectives based on our current knowledge, including the public response to the draft recovery plan, and we expect that they may be further refined in the future as more information becomes available. The determination of whether a distinct population segment of bull trout is recovered will rely on an analysis of the overall status of the species, threats to the species, and the adequacy of existing regulatory and conservation mechanisms.

It is possible that interim regulatory relief may be provided in areas where bull trout populations meet their recovery criteria, even though not all recovery criteria has been met in every unit in the overall distinct population segment. One potential means to accomplish this would be through an exemption from take prohibitions for bull trout, at the appropriate scale, through the special rulemaking process under Section 4(d) of the Endangered Species Act. In that case, bull trout would remain listed as threatened in that area, but the prohibitions against take could be relaxed, and certain kinds of take authorized through the special rule.

We will continue to explore cooperative options for protecting and recovering bull trout along with our State and tribal partners.

Mr. Chairman, this concludes my testimony. I appreciate the opportunity to appear here today, and I would be pleased to answer any questions you have.

STATEMENT OF JAMES L. CASWELL, ADMINISTRATOR, IDAHO GOVERNOR'S OFFICE OF SPECIES CONSERVATION

Good afternoon Mr. Chairman, members of the Subcommittee. Welcome to Boise and thank you for this opportunity to testify. First of all, I want to congratulate you Mr. Chairman on your recent hiring of committee staff. I understand your new employee brings a wealth of knowledge from his previous job, and is certain to take the State of Idaho's interests to heart.

My name is Jim Caswell. I am Administrator of the Governor's Office of Species Conservation. The Office is a part of the Executive Office of the Governor, much in the same way as the President's Council on Environmental Quality is housed in the Executive Office of the President. Our job is to develop State policy for listed, and soon-to-be-listed, species and to engage landowners and others in species conservation.

I appreciate the opportunity to speak to you today to provide our thoughts on the direction of bull trout conservation in Idaho and the Pacific Northwest. Prior to the listing of the species in 1998, Idaho had developed numerous activities to preserve and restore the fish. The Idaho Department of Fish and Game had developed a conservation plan for bull trout, which eventually evolved into then-Governor Phil Batt's Bull Trout Conservation Plan released in 1996. Since the release of Governor Batt's Plan and the listing of the species in 1998, there has been much progress made to benefit the fish. Yet there remain many obstacles in our way. I would like to discuss a number of them today, and provide some thoughts on how I believe we can best proceed. In particular, I would like to focus on two sections of the Act—Section Four and Section Six which provide us both our current problems and at the same time offer us possible solutions.

Issues Pertaining to Section 4 of the ESA

As you know, the U.S. Fish and Wildlife Service is in the process of developing both a recovery plan and critical habitat designations for bull trout. Idaho has been

very involved in the development of both documents. The process for designating critical habitat is on hold however, pending further congressional action on funding. While we continue to debate the merits of critical habitat designation, and it has been much discussed, this delay has created uncertainty and raised questions on how to proceed. We ask you to support adequate funding to finish the process of bull trout critical habitat designation, and to continue the recovery planning process.

Unfortunately, critical habitat designation has become a litigation quagmire and has commandeered the entire listing program. After 6 years of litigation and court orders requiring critical habitat designations, the Service has been unable to move ahead on critical habitat designations for 32 species, including bull trout. Simply stated, the process doesn't work. Critical habitat designation and recovery planning need to be streamlined. We support current efforts in Congress to allow the Secretary of Interior to determine, in the first place, if critical habitat designation is needed in the best interests of the species. And second, require the recovery planning process and critical habitat designation, if necessary, to run concurrently.

Another issue Governor Kempthorne has raised is the Service's designation of the Columbia River Distinct Population Segment, or DPS, of bull trout. The DPS establishes the boundaries of the recovery area, and the bull trout DPS has, I believe, one of the largest coverages of any DPS in the United States. It encompasses the majority of Idaho and Washington, and large portions of Montana and Oregon. We believe that on many fronts the biology, the recovery, and the economy—this DPS makes no sense. In a bizarre way, the Service must agree, because their first step in the recovery planning process was to take this huge DPS and break it down into recovery subunits. The current DPS is so large that it takes in areas with healthy populations which never should have been listed in the first place. Ultimately this will prevent us from ever delisting the fish where it is warranted, as in the case in Idaho's Little Lost River Basin, because populations elsewhere in this massive DPS will remain weak, as is the case in Oregon's Malheur River Basin.

The State of Idaho has suggested in formal comments to the Service to break the Columbia DPS into smaller DPSs. This recommendation is based on current scientific evidence suggesting there is not a good genetic or population basis for the designation of the Columbia DPS. Even the Service's current draft recovery plan notes that genetic information since the time of listing suggests a need to further evaluate the DPS. Smaller, more appropriate DPS units would allow for a more credible approach to the designation of critical habitat, to recovery, to direct limited resources, and ultimately to delisting.

Next, I have as an attachment to my testimony a copy of a letter to Interior Secretary Gale Norton dated August 18 from Governor Kempthorne and the entire Idaho congressional Delegation. Mr. Chairman, we thank you for signing this important letter. As you know, we are requesting that the Secretary begin the 5-year status review for bull trout because there is a great deal of new scientific information on bull trout throughout its range. Idaho firmly believes that with this new information, we will find that bull trout are doing well, even thriving, in large parts of Idaho. This new information will augment the argument to break up the large Columbia River DPS so that, ultimately, delisting can be achieved on a biologically reasonable scale.

Issues Pertaining to Section Six

These issues and others show the need for a full, open, and collaborative relationship with all entities involved with the ESA, including bull trout recovery. Idaho needs the ability to fully engage as an equal partner in the protection of bull trout and all listed species. The original framers of the Endangered Species Act recognized the importance of State participation when they crafted the sixth section of the Act.

Other Federal laws call for a State role the Clean Water Act and the Clean Air Act immediately come to mind and provide for "cooperative federalism," or components of Federal law that are appropriate for oversight and implementation by the States. Those of us who operate delegated Federal environmental programs can attest there is a greater chance of environmental compliance when the State is brought into the partnership between government and the regulated community. An incentive-based approach is key.

This same concept "cooperative federalism" must be applied to the Endangered Species Act. As I mentioned earlier, Section 6 is the provision in the ESA authorizing the Secretaries of Commerce and Interior to approve cooperative agreements with the States. Idaho maintains the Federal Government should utilize Section Six to build relationships, to bring the State's expertise to bear, and to work collaboratively to accomplish the aims of the ESA.

I believe that Section 6 of the ESA can be utilized in a similar fashion as Section 402 of the Clean Water Act, where States have the opportunity to tailor their programs to meet their needs once they receive appropriate approval by the Federal agency delegating authority. For Idaho, this means that those who want to voluntarily come forward and seek protection under the ESA for their activity may have to go no further than, say, a State office having appropriate authority over State conservation programs on State lands or wildlife. I know you are very familiar with the Upper Salmon Agreement, which can be seen as one example of how Idaho has worked to develop a cooperative federalism partnership.

In summary, Mr. Chairman, I would like to reiterate the obstacles we need to overcome as we develop a workable bull trout recovery plan and as we protect and restore other species under the ESA:

- The critical habitat designation process for bull trout must continue, but the Secretary should have discretion if and when critical habitat is designated, and it must be tied to the recovery process and not to the listing process;
- The Distinct Population Segment for the Columbia River bull trout must be broken into smaller, more biologically based segments in order to make recovery achievable;
- The Secretary of Interior must commence the 5-year status review for bull trout, in order for us to make decisions based on the new scientific information since its listing; and
- Congress must push for, and the Service must allow, expanded use of cooperative relationships under Section Six.

Mr. Chairman, thank you again for holding this important hearing in Idaho and for allowing me to comment. I would be happy to answer any questions the Subcommittee may have.

STATEMENT OF CLIVE J. STRONG, DEPUTY ATTORNEY GENERAL, STATE OF IDAHO

Mr. Chairman and committee members, thank you for the opportunity to testify before this Subcommittee regarding Federal cooperation with States on bull trout recovery under the Endangered Species Act. One need only skim the U.S. Fish and Wildlife Service's Bull Trout Draft Recovery Plan to understand the daunting task that lies before the agency. The recovery plan encompasses most of the Columbia and Klamath River basins and its implementation will affect the lives of stakeholders throughout three States. As the plan acknowledges, the activities contributing to the decline of bull trout vary from subbasin-to-subbasin and, therefore, recovery measures must be site specific and tailored to each basin. Given these factors, it is obvious that any effort by the U.S. Fish and Wildlife Service to implement a bull trout recovery plan is doomed to failure absent active State and local involvement in the process. Fortunately, the Endangered Species Act provides for such State and local involvement. My testimony will focus on how local, State and Federal cooperation under the Endangered Species Act in the Lemhi River Basin in Idaho is achieving meaningful, on-the-ground habitat improvements for anadromous fish and bull trout and the potential for expanding the Lemhi conservation model to bull trout recovery through the use of a State of Idaho Section 6 Cooperative Agreement.

The Lemhi River Basin is a remarkable example of community-based conservation. The Lemhi River Basin is located approximately 775 miles from the Pacific Ocean and was, at one time, one of the most productive salmon and steelhead areas in the Columbia River Basin. In early 1909, however, the mouth of the Lemhi River was dammed and the anadromous fish runs were almost extirpated. In addition, the development of irrigated agriculture resulted in the dewatering of many tributaries and the isolation of bull trout populations. After removal of the dam in 1957, the anadromous fish runs began to return to the river; however, agricultural development limited access to some of the available habitat and bull trout populations remained isolated.

In the 1980's, as the Columbia River Basin anadromous fish runs began to collapse, and before the cloud of the Endangered Species Act descended over the Lemhi, farsighted ranchers in the Lemhi Basin became concerned that they were losing an important part of their heritage and felt compelled to take action to preserve the Lemhi salmon and steelhead runs. Recognizing that they could not achieve their objective alone, they sought the assistance of State and Federal officials to develop an anadromous fish recovery plan. This effort led to the creation of the Lemhi Model Watershed Project. A technical committee consisting of representatives of the Federal agencies, the State and the Shoshone-Bannock Tribe worked with the local landowners to develop a watershed project plan for the Lemhi Basin. The plan con-

sisted of an assessment of fish habitat conditions within the basin and habitat goals, and prioritized a list of projects to achieve those goals. The central feature of the plan was development of a local solution tailored to the fish habitat needs within the Lemhi Basin.

The Lemhi Model Watershed Project was successful in reducing the number of irrigation diversions through consolidation of diversions and in improving riparian habitat through fencing and screening of diversions. The project also implemented a voluntary flush program to provide water for salmon migration during periods of dewatering in the lower Lemhi. These activities were possible because Federal and State agencies worked with the local landowners to craft a local solution rather than imposing a one-size fits all Federal solution.

The success of the Lemhi Model Watershed Project was threatened in the summer of 2001 when NOAA Fisheries, which had previously elected not to participate in the Project, unilaterally initiated enforcement action against some local landowners for the death of three salmon caused by dewatering the lower Lemhi River. Local landowners were upset that the NOAA Fisheries' action ignored the many efforts of the local community to restore fish habitat. The State stepped in and encouraged NOAA Fisheries to work with the local community rather than pursue an enforcement action. The local staff of the Idaho Department of Fish and Game played a critical role in bridging the gap between the Boise-based NOAA staff and the local landowners because of the longstanding working relationship of IDFG with each of the parties. While initially there was a great deal of distrust, a State-lead mediation process helped the parties develop an appreciation of their respective interests. As a result, the parties have successfully implemented three interim conservation plans that provide a bridge to the development of a long-term conservation plan for the Lemhi Basin. The parties have recognized the need to ensure that the plan covers all listed fish species and, therefore, have expanded the plan to include measures to address bull trout. The Boise U.S. Fish and Wildlife office has played an active and constructive role in the discussions.

The hallmark of the Lemhi Conservation planning process has been the willingness of the Federal agencies to work with the local community to devise a local solution for resolving the dewatering problem in the lower Lemhi River. Initially, NOAA Fisheries intended to sue the few water users who owned the diversion where the three dead fish were found in 2001. This action would have created a crisis, but no real resolution, to the dewatering problem. Under the prior appropriation doctrine, water rights are delivered based upon priority date. Since the water users who owned the diversion had some of the earliest priority dates, the effect of cutting off water delivery to these water users would have been to reduce the amount of flow coming down to the diversion and would have exacerbated the dewatering problem. Because junior water users are entitled to divert water not being used by senior water right holders, less water would have been delivered to the lower Lemhi. This situation would have led to additional enforcement actions against other water users and chaos in the State water delivery system.

Through interest-based negotiations with local landowners and the State, the parties crafted a market-based solution for providing instream flows in the lower Lemhi River. The local community agreed to seek State legislation authorizing the Idaho Water Resource Board to establish an instream flow water right on the lower Lemhi and creating a local water bank that provides a mechanism for renting water to satisfy the instream flow. This approach avoided local conflict, avoided the disruption of State water law, and is the cornerstone for development of the long-term conservation agreement.

While the work in the Lemhi is not finished, the State/local process demonstrates what is possible when Federal agencies are willing to work with State and local interests instead of assuming a Federal solution is the best solution. The parties are well on the way to development of a long-term conservation plan that will provide for the habitat needs of salmon, steelhead and bull trout recovery basinwide. The parties are improving the water bank process to ensure adequate migration flows, improving riparian habitat through additional screening, diversion consolidations and riparian fencing, and exploring means of reconnecting key tributaries to provide migration corridors for bull trout.

The Lemhi approach fits nicely within the congressional policy directive of the Endangered Species Act "that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." 16 U.S.C.A. §1531(c)(2). Indeed, Section 6 requires the Secretary to "cooperate to the maximum extent practicable with the States," and to consult with [a State] "before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species." 16 U.S.C.A. §1535(a).

Since the U.S. Fish and Wildlife Service has identified habitat degradation and genetic fragmentation as the primary causes for decline in bull trout, it is clear that many of the recovery measures will center on changes to water and land management. As amply demonstrated in the Klamath River and the Rio Grande River Basins, a federally mandated solution does not achieve desired conservation goals, but instead, engenders divisive litigation. In contrast, the Lemhi Conservation Agreement demonstrates that a State-led recovery effort results in meaningful solutions that enjoy community support.

Section 6 expressly contemplates State-led efforts for species conservation through cooperative agreements. Section 6 of the Endangered Species Act provides that the Secretary "[i]n carrying out the program authorized by this chapter, . . . shall cooperate to the maximum extent practicable with the States." 16 U.S.C.A. §1535(a). In furtherance of this policy, "the Secretary is authorized to enter into a cooperative agreement . . . with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species." 16 U.S.C.A. 1535(c)(1).

Under a Section 6 Cooperative Agreement, the State, with the assistance of the local land owners and Federal agencies, could develop conservation goals and an implementation plan for bull trout as well as other listed species. On an annual basis, the progress of the State could be reviewed by the appropriate Secretary and necessary revisions to the plan could be implemented. This type of basinwide adaptive management approach provides the only real opportunity for meeting the objectives of the Endangered Species Act. Too much money is being wasted on process and litigation without real benefit to the species. Section 6 provides an opportunity for immediate on-the-ground results, but will require a Federal commitment to funding and a change in the top-down enforcement philosophy that too often pervades the thinking of Federal agencies.

Thank you for the opportunity to address the Subcommittee.

STATEMENT OF BRAD LITTLE, STATE SENATOR DISTRICT 11

Good afternoon Mr. Chairman, members of the Subcommittee. My neighbors and constituents appreciate your interest in the impact of the bull trout listing on rural Idaho.

My name is Brad Little. I represent Gem and Canyon Counties in the Idaho State Senate. I serve on the Resource and Environment Committee, which has jurisdiction over Endangered Species Act (ESA) issues. I also ranch in bull trout habitat. My neighbors and I have suffered the economic costs of endangered species recovery. Our ranch has taken non-use on a very good Federal grazing allotment administered by the U.S. Forest Service that supports salmon, wolves and bull trout. Both the wolves and salmon were introduced by the Federal Government and after many years of working to balance the interests between grazing and listed species, the regulatory costs became more of a burden than the pasture was worth. Consequently, we no longer graze on this Federal ground. My goal today is to protect our neighbors from suffering a similar fate.

The cost to my legislative district is massive. Today, Boise Cascade, one of the largest landowners in the State is pondering whether to stay in the timber business or sell their approximately 200,000 acres of prime wildlife and recreational open space due to the draconian costs of land management with bull trout regulations being one of the most costly. If Boise Cascade elects to sell their lands to the highest bidder, these critical open spaces will be lost forever. Already over 500 jobs have been lost due to the Boise Cascade decision to consolidate their timber processing outside of Idaho. As a result of the mill closure the cost of timber on the stump has dropped by 40 percent. This translates into a loss of one-million dollars per year to the Idaho Public Schools Endowment. I hardly think that the authors of the Endangered Species Act intended for this to occur.

My neighbors are all outdoor and wildlife advocates. They enjoy clean water and abundant wildlife. They provide a critical part of the ecosystem for wildlife. We should not saddle them with a disproportional amount of the costs for species recovery. I implore Congress to use the tools that make America great to fix this dilemma. Our representative democracy and the free-market system are the keys to resolving problems, to produce incentives for good management, and to be results-oriented, as is the need for species recovery.

The issue of adequate and sustainable funding for recovery is paramount. What happens if the funding goes away? Will we be forced by a Federal judge to cease irrigating and ranching? Are our actions tied to adequate Federal funding? I ask for your guidance to Idaho on this critical aspect of recovery.

Let me give you a good example. Some of my property is near Squaw Creek, an important stream for bull trout in the area. Most of the land upstream is Federal land, and the lower portions are private with a number of land use activities. There has been a great deal of discussion and investigation regarding bull trout recovery on Squaw Creek. We have some good ideas and many farmers and ranchers are interested. If some of the proposals were implemented, the irrigators and ranchers in the upper Gem County area would have enormous costs for fish screens and more stringent riparian management regulations. A recent assessment and proposal for needs in the Squaw Creek area estimate costs as much as \$300,000. Are we to bear all of these costs? Are we punished if we do not follow-through with these projects?

Without an exact goal, current, bull trout are a disincentive to good management. If a landowner has a riparian area without bull trout and the possibility that better management will create higher water quality bringing in bull trout the incentive is not to improve the riparian habitat. Mr. Chairman, we should not have to fear the consequences of good management. Why should a land manager make the improvements in riparian habitat that would be conducive to bull trout habitat and thus more regulation? To overcome this disincentive, I recommend establishment of a concrete measurable end goal of so many bull trout or so many acres of habitat. The disincentive is significantly reduced if a reasonable goal is established where proliferation of the species is beneficial versus detrimental.

Allow us to be partners on recovery issues. Allow the State of Idaho the responsibility to implement recovery programs. I work with the State on water quality issues, and I am sure it is better than working with the EPA. The State has responsibility for water quality issues and they should also have responsibility for ESA recovery programs.

Mr. Chairman, I want to thank you for giving hope to Idaho that we can maintain an improving ecosystem and sustainable rural communities, no simple challenge. I of course would be happy to respond to questions.

STATEMENT OF BOB LOUCKS, SALMON, IDAHO

I am Bob Loucks. I am a Professional Animal Scientist and spent almost 35 years working with ranchers in Central Idaho. I have been involved in endangered species programs since 1982. I served on the Idaho Legislative Wolf Committee, the Irrigators Committee to Enhance Anadromous Fish Recovery, and the Advisory Committee to the Lemhi, Pahsimeroi, East Fork Model Watershed Program for 8 years. I have resided in the Salmon River Basin for over 33 years.

ESA Listing

I don't know much about the rest of the west, but I do know a lot about the Salmon River Basin, especially the Upper Basin. Based on personal knowledge, contact with State and Federal fisheries biologists, and the USFWS critical habitat and recovery plan proposals, I cannot see how Bull Trout were listed as endangered in the Salmon River Basin in the first place.

Some 8958 stream miles are proposed for critical bull trout habitat in Idaho. The Salmon River Basin, with about 17 thousand miles of streams, has 4777 stream miles proposed (53 percent of the State total). Now, this would be understandable if we were short of bull trout in the basin. However, according to USFWS, there are two sub-populations of bull trout in the basin. "Neither population is at risk of 'stochastic extirpation.'" I think in plain English that means bull trout are not endangered in the Salmon Basin. The "magnitude of threats is considered low in this basin." Again, in plain English this means that bull trout are not threatened in this basin. There are 125 known local populations (many in multiple streams) in the basin. I believe that we should conduct a status review (as called for by the ESA) and delist bull trout in the Salmon Basin.

Current Status of Landowner Recovery Efforts on ESA-listed Fish

Upper Salmon Basin landowners, particularly Lemhi Basin landowners have been leaders in cooperative efforts at fish habitat restoration. Their efforts actually pre-date the listings of salmon, steelhead, and bull trout. Cooperation with State and most Federal agencies has been outstanding. Most of the effort over the past 11 years has been directed at anadromous species; however, there has also been a notable effort on bull trout since their listing.

The attitude of most ranchers is that if the habitat enhancement helps anadromous fish, it also helps all other resident fish.

One of the impediments to more cooperative efforts on private lands is the hurdle that Federal land management agencies put in place on grazing allotments once a species is listed. BLM and USFS throw out all the range science that they ever

learned in an attempt to accommodate NOAA Fisheries (formerly NMFS) and USFWS (neither of which has any range management expertise). If a rancher is so unlucky as to have an allotment with both salmon and bull trout, there is no grazing a pasture with salmon habitat after August 15 or a pasture with bull trout habitat after September 15. We now have forage management by calendar, instead of plant phenology. So, a planned grazing system is destroyed, ranch economics are harmed since the resulting grazing season doesn't fit the rest of the operation, and range plant health is not as good as it should be.

In Lemhi County, two-thirds of commercial cattle ranches have Federal grazing permits. Federal grazing accounts for about one-half the pasture available or about 30 percent of the total cattle feed requirement in the county. Even though the Federal Government manages about 92 percent of the land in the county, probably 95 percent of the salmon habitat is on the 8 percent that is privately owned. The point that I am making is that efforts to minimize impacts to ESA listed fish on Federal lands must be dove-tailed with efforts on private lands. Otherwise, there will be more harm created on private lands than can ever be mitigated by actions on Federal lands.

Conservation Plans vs. Habitat Conservation Plans

Private landowners and organized private groups such as the Model Watershed Advisory Board, Lemhi and Custer Soil & Water Conservation Districts, Water District 74, and the Lemhi Irrigation District are almost unanimous that they would rather develop an Idaho Conservation Plan through the State than have to deal with the myriad of Federal agencies directly. The State can act as a buffer between the landowners and the Federal agencies.

A group of Lemhi Basin ranchers has been working with the Idaho Attorney General, Idaho Dept of Fish and Game, NOAA Fisheries and USFWS for almost four years to develop a conservation plan that trades high fish priority actions for ESA coverage. This conservation plan would be much easier for ranchers to accept if it is a Section 6 plan with the State in the lead than if it is a Habitat Conservation Plan. We believe that there is room for accommodation for all parties if NOAA Fisheries is serious about getting an agreement.

Recovery Goals for Bull Trout

The Salmon Basin goals listed in the USFWS bull trout recovery plan are so amorphous and subject to "adaptive management", that it is unlikely they will ever be reached. The only two populations listed "at risk" are Lake Creek and Opal Lake. Both are dead-end drainages with no surface connectivity to any river or stream. So, the future appears to be an endless striving for recovery for fish that never should have been listed in the first place. Ranchers and private groups are willing to work to restore stream connectivity on some drainages where there is a reasonable expectation of success. That seems likely to be the only logical action that can be taken.

Thank you for inviting comment.

STATEMENT OF JANE GORSUCH, INTERMOUNTAIN FOREST ASSOCIATION

Mr. Chairman: My name is Jane Gorsuch and I am the Vice President for Idaho Affairs for the Intermountain Forest Association (IFA). The IFA is an organization of wood product manufacturers, timberland owners and related businesses in the northern Rockies. Our Association develops and implements solution-oriented policies aimed at securing a stable and sustainable supply of timber on public and private lands.

Thank you for the opportunity to provide oral testimony to the Subcommittee today. I appreciate the time of the Subcommittee and staff to hold this field hearing on such an important matter Cooperation With States on Bull Trout Recovery under the Endangered Species Act.

It is indeed an honor for me to appear before you, the distinguished Subcommittee Chairman and Senator from Idaho. On behalf of our members, I hope to provide some ideas to the Subcommittee for ensuring that sufficient progress is made toward achieving bull trout recovery; explore the U. S. Fish and Wildlife Service's cooperation with States in implementing bull trout recovery programs; identify additional opportunities for expanding the role of States in recovery; identify how "recovery" will be measured and determined; and to identify how to return management authority to the States upon achieving recovery goals.

IFA and Idaho's forest industry support programs to benefit fish and forests. Our members have taken, and continue to take, measures that not only protect, but also recover fish listed under the Endangered Species Act (ESA). Many of our members

have been active since the beginning of the State's effort to conserve bull trout and thus avoid a Federal listing of bull trout in Idaho. We have, since the first, called for local solutions to these issues and continue to call for these types of approaches to aid the recovery of listed species.

If the focus is on voluntary, incentive based efforts to accomplish fisheries benefits, there is much that can be accomplished. Balance is the key. Finding the activities that most benefit fish and still allow a wide range of forest management activities is our mission and should be the goal of the Federal family as well. IFA has advocated this general approach for management of bull trout prior to its listing.

We supported, and participated in, the Idaho State Bull Trout Conservation Plan. These efforts were meant to bring benefits to fisheries and thereby avoid a Federal listing of bull trout.

Unfortunately, the Federal Government did not support these local planning efforts and listed the fish anyway. This action, after much State and local effort was made to create and implement a State Bull Trout Conservation Plan, created much animosity and ill will. Since the listing, local planning under the State Bull Trout Conservation Plan lost momentum. This is unfortunate as there were several benefits that could have been achieved. This is an example of where the Federal listing stalled progress of recovery rather than promoted it.

After the Federal listing occurred, the focus for listed native fish planning efforts become more complicated. Local land owners, previously interested in participating in conservation efforts under a State of Idaho plan, now expressed a need to receive legal assurances that they would not be penalized under the ESA for incidentally harming the very fish they had previously been helping. With the listing, non-Federal landowners lost the voluntary incentive to take steps to conserve habitat and protect fish and to assist the Federal Government with their job of recovering listed fish.

Under the ESA today, the private landowner obligation is to not "take" a member of the listed species. This obligation has proven hard to define and is a counter-productive standard. If the fundamental objective of this law is to do reasonable things to benefit species in decline (an objective we support), incentive based programs need to be established to allow private landowners to embrace programs which go beyond the avoidance of take, and bring benefits to species which will aid in their recovery. We are looking for ways to make that work in Idaho.

With listing of the bull trout, the heavy hand of the ESA descended upon non-Federal landowners creating a chilling effect on continued voluntary efforts. We have been pursuing options that bring the non-Federal landowner back to the table to assist in meeting the Federal recovery goal while providing them protection.

The focus has shifted to a more general program, administered by the State, where interested private forest landowners can voluntarily enroll their lands in conservation and recovery efforts, pledging adherence to forest practices which will afford even larger benefits to fish than would otherwise occur, and by doing so would receive legal compliance assurance under the ESA.

IFA has been in lengthy and comprehensive discussions with both the State and Federal officials about accomplishing this result.

We think we are close to implementing a program which will bring these results on the ground.

Discussion of the specific details of this program is not possible in a public forum at this time because these conversations are being conducted under a Federal court confidentiality order.

However, they do include the same important elements we have discussed previously.

- 1) Special management practices for fish bearing streams, which ensures that important riparian functions are protected and enhanced;

- 2) New standards for road construction and stream crossings where it will impact fish resources and;

- 3) An important program to correct "legacy" problems, identified through the State's CWE process, and possible cooperative funding mechanisms to assist non-Federal landowners to accomplish the legacy problem corrections.

Our vision is that the Federal Government will agree to the basic standards of this program, and then allow it to be fully administered by the State as an extension of the State's forest practice act authorities. Private forest landowners would then voluntarily enroll their forest lands to accomplish the benefits for fisheries on their land, and receive ESA compliance assurances, and qualify for cooperative funding opportunities.

This could set a new model for incentive based, voluntary participation in endangered species management, which should bring rapid benefits to the species. It can make State governments and private landowners partners with the Federal Govern-

ment in recovering listed species while allowing State and private forest land owners the opportunity to continue to utilize their forest resources.

Science shows the biggest benefits to fish come from careful correction of legacy road issues, stream crossing issues, and stream barriers problems. We know these practices work and encourage their use rather than extensive new land use restrictions.

Sec. 6 of the ESA seems to us to be directed at exactly the program we describe. We believe that this approach may well be the future of Federal/non-Federal cooperation in the future.

Thank you again for the opportunity to provide input on these important topics. I stand for any questions you may have.

STATEMENT OF SCOTT YATES, DIRECTOR, IDAHO WATER OFFICE, TROUT UNLIMITED

Senator, my name is Scott Yates, and I appear today on behalf of Trout Unlimited (TU) in testifying about bull trout recovery efforts in Idaho. By way of introduction, I will talk briefly about some of the substantial progress that has already been made to restore bull trout, as well as identifying some of the key remaining obstacles to recovery, including stream dewatering that fragments habitat. I will then spend the bulk of my time talking about project-specific work that illustrates successful, ground-up recovery efforts that involve cooperation with landowners. I'll conclude with a couple of ideas regarding how such efforts can be expanded in order to ensure that recovery efforts are speedy and able to meet the needs of both landowners and bull trout.

Trout Unlimited is the nation's largest coldwater conservation organization with a mission to conserve, protect, and restore North America's trout, salmon, and steelhead fisheries and the watersheds upon which they depend. Trout Unlimited is a private, non-profit organization with 127,000 members and 450 chapters nationwide. There are approximately 1,900 TU members in Idaho with chapters in Boise, Sandpoint, Twin Falls, Pocatello, Idaho Falls, and in both Sun Valley and Teton Valley. These local chapters are extremely active and work with State and Federal resource agencies and private landowners to accomplish salmonid habitat restoration goals throughout the State.

I am a member of Trout Unlimited's national staff working out of our Idaho Falls Office, and currently serve as the Director of the TU Idaho Water Office. We started our Idaho water program in January 2003, and our efforts are part of a larger TU program with field offices in Montana, Colorado, Wyoming and Utah that focuses on streamflow restoration issues in the West. The primary reason for establishing field offices in each of these States is to ensure that our organizational approach to streamflow issues correlates with the diversity associated with water law in the West. In other words, water law is primarily a function of State law, and each State has very specific water code provisions intended to deal with the use and allocation of water within their borders. Our program is designed to address specific State resource problems based on the inherent local nature of such problems, and be responsive to local efforts to deal with the difficult technical, legal, and policy issues associated with protecting or restoring streamflows.

The TU Idaho Water Office has focused our initial efforts on identifying ground-based projects where we can work with State and Federal resource agencies and private landowners to identify and implement streamflow restoration projects. This includes efforts in important bull trout recovery areas such as the Upper Salmon River's Pahsimeroi River Basin and the Little Lost River and its tributaries.

Introduction

While the metaphor is overused, bull trout are like the proverbial "canary in the coal mine" when it comes to indicating water quality and quantity problems. Across the Columbia River Basin and other parts of the Pacific Northwest, resident bull trout were historically found in remote headwater streams that were clear and clean. Fish utilized bigger tributary and river systems for spawning migrations to access natal streams. Both the small resident and larger migratory or "fluvial" fish flourished in central and northern Idaho's rivers and streams. While many of these populations remain at varying levels of abundance and health, the larger fluvial fish that migrated regularly and occupied the lower reaches of tributaries and the mainstem portion of most rivers have been essentially cutoff at the knees in terms of accessible habitat.

There are a number of causes for the decline in the migratory life history form of bull trout. The two primary causes are fish passage barriers and stream dewatering both of which fragment historical bull trout habitats. The former cause

boils down to the need to address fish passage and screening issues at both agricultural and hydroelectric dams and diversions. This is in fact one area where the State of Idaho has been as successful as any other State in the region and where the Federal State relationship in terms of ESA recovery planning and implementation has been successful: screening and providing volitional and unimpeded upstream and downstream fish passage on small and medium size irrigation dams and diversion structures in areas where ESA-listed fish are present.

Fifteen years ago addressing such concerns, in light of the sheer number of diversions and the huge administrative task associated with prioritizing and funding conservation activities and the outreach to private landowners, seemed unachievable. We now know that conservation efforts are paying dividends and increasing the survival and recruitment of both adult and juvenile salmon, steelhead, and resident trout in places like the Upper Salmon River. Collaborators such as the Idaho Department of Fish & Game and Upper Salmon River Watershed Project should be commended for their fish screening efforts.

Stream dewatering, however, is the more difficult issue in many bull trout recovery areas where lack of habitat connectivity is a primary factor for species decline. Because of unnaturally low flows there simply isn't enough water in many rivers and streams year-round to support all bull trout life history stages. The problem is especially evident in the lower end of important tributaries and the river mainstem below them. There is no insidious plot to dewater these streams. In most areas, traditional farming and ranching operations have done what they've always done: take the amount of water that they have been authorized to use pursuant to State law in order to meet crop or cattle production needs. Further, Idaho is not alone in terms of the need to address dewatering issues. Water use and impacts to traditional bull trout habitat are similar in areas of Oregon and Washington east of the Cascade Mountain Range, the Klamath River Basin, and parts of northwest Montana including the Blackfoot River drainage.

The unfortunate reality and legacy of these traditional water use operations is that parts of many tributaries with functioning habitat mostly on either U.S. Forest Service or U.S. Bureau of Land Management Lands now serve as islands of isolated habitat and aquatic systems have become disconnected or fragmented. This has grave implications for life history diversity and does not bode well for bull trout recovery. In other words, there is no longer the necessary genetic interchange between bull trout populations that historically occurred; the larger migratory bull trout no longer have access to important spawning and rearing grounds, and the genetic integrity, diversity, and legacy of this important Idaho native fish are at risk.

We cannot recover bull trout without dealing with these important streamflow issues. However, in TU's opinion, there is much occurring in Idaho on the ground in places like the Lemhi River, Big Hat Creek, and other parts of the Upper Salmon River Basin that offers encouragement regarding the possibility for creative solutions. Further, the Idaho examples and streamflow restoration activities in other western States show that many of the solutions are developed at the local level, create much needed incentives for private landowners, and provide long-term benefits for both the rural economy and ESA-listed species.

Trout Unlimited is a relatively new stakeholder in places like the Upper Salmon River Basin. We do not have the history of involvement that many of the Federal and State agencies and private landowners have in places like the Lemhi River drainage. But our organization does have a long history of working with resource agencies and private landowners to improve salmonid habitat in Idaho. We are working hard to identify places to restore streamflow, and develop creative solutions that compliment Federal, State, and landowner efforts. Two of our initial focus areas are in important bull trout recovery areas, the Pahsimeroi River and the Little Lost River.

The Pahsimeroi River

Trout Unlimited kicked off a long-term partnership with the BLM in 2003 to work toward large-scale habitat restoration in the Pahsimeroi River drainage. Virtually all of the Pahsimeroi River tributaries that drain the southern portion of Lemhi Mountain Range have been historically captured as they emerged from Federal lands and diverted via canal to provide irrigation water. One of the primary goals of the TU/BLM partnership is to design strategies to restore the stream channel on various Pahsimeroi tributaries so that water is able to make from the headwater areas on Federal lands all the way to connect to the mainstem Pahsimeroi River. Obviously, in order to achieve such goals, streamflow restoration must occur.

As previously mentioned, TU is a newcomer to Upper Salmon River streamflow restoration efforts. Discussions regarding the restoration of streamflows in the Pahsimeroi have been ongoing for a number of years, and various projects have been

proposed both to restore mainstem flows and tributaries like Little Morgan Creek and Falls Creek. Agencies such as the U.S. Fish & Wildlife Service, National Resource Conservation Service, Idaho Department of Fish & Game, and Idaho Department of Water Resources and numerous private landowners have been involved in these discussions. Each of the proposals would go a long way toward restoring the Pahsimeroi system for both anadromous salmon and steelhead and bull trout. The success of each project will depend on long-term persistence and the eventual buy-in from the landowner and water user community.

I'd like to talk briefly about one particular Pahsimeroi River tributary Falls Creek because it is the first area of emphasis for the TU/BLM partnership and includes a number of project components that help illustrate the complexity of these large-scale flow restoration projects from the standpoint of project development, design, funding, and implementation.

As with other Pahsimeroi River tributaries, water users in the Falls Creek sub-drainage have diverted most of the streamflow as it leaves higher elevation Forest Service land and then delivered the water through ditches to traditional hay and pasture operations. The goal of the project is to work with private landowners to modernize the irrigation delivery and water use system to maximize efficiency so that traditional ranching operations are maintained while at the same time additional water is freed up to help reconnect Falls Creek to Big Creek and the mainstem Pahsimeroi River system and provide additional stream habitat.

Obviously, project development is complex because the project involves both private and Federal lands. Further, various Federal and State agencies are involved each with varying jurisdictions and interests. For instance, the BLM is primarily concerned with restoring the stream channel and aquatic environment for the portion of Falls Creek that traverses through its lands. At the same time, the U.S. Fish & Wildlife Service is responsible for recovering ESA-listed bull trout on both Federal and private lands in the Falls Creek system. Finally, the Idaho Department of Water Resources is responsible for the water rights analysis and ensuring that any type of strategy to conserve water and restore streamflows comports with the limited amount of flexibility that the Idaho Water Code provides to protect and restore streamflows.

In terms of funding, large-scale restoration projects such as Falls Creek are expensive. The final project will likely include a new diversion structure, screen and pump, thousands of feet of mainline pipe, new center pivot sprinklers, and all of the costs associated with ensuring that once water returns to the system there is a technically defensible strategy to enable the water at the very least during strategic migration periods to make it all the way to the Pahsimeroi River. Funding is being raised from various Federal sources including the Fish Restoration and Irrigation Mitigation Act (FRIMA), the U.S. Fish & Wildlife Service Landowner Incentive Fund, and National Fish and Wildlife Foundation and private sources such as the Idaho Council of Trout Unlimited necessary to ensure that the funds are "matched" as required by most of the Federal funding programs.

Finally, the technical issues associated with reconnecting tributaries are difficult. It is important to note that Falls Creek primarily because of historic water use operations has not had consistent flows for much of the last century. The current stream channel below the existing diversions is barely discernible. Therefore, a substantial amount of funding is required to design and implement a stream channel restoration strategy. Further, even with such a strategy, there are considerable uncertainties associated with restoring flows to a tributary like Falls Creek with a substantial alluvial fan, and questions remain whether or how often it will actually reconnect with Big Springs and the mainstem Pahsimeroi River. Falls Creek serves as a prime example of the unmistakable and complex nexus between restoring flows and habitat restoration in central Idaho. In most cases where a stream has been dewatered and disconnected for a substantial term of years, one cannot occur without the other.

In sum, large-scale restoration projects that have a streamflow component take an inordinate amount of time to develop and implement, are extremely expensive, and are technically complex. But, for TU's money, they are worth it. For much of the past two decades, the emphasis for fish protection and restoration in the Columbia River Basin has been on partial fixes and technologically based solutions such as hatcheries. Large scale flow and habitat restoration efforts like those embodied in the Falls Creek project are worth the uncertainty because they involve collaboration at the most local level and actually deal with the underlying problems and factors for species decline in a comprehensive and systematic fashion. These projects go well beyond merely treating the symptoms of species decline in an unorganized and disconnected way.

Little Lost River

I wanted to talk a little bit about what I think has the possibility for a great success story and that's bull trout recovery efforts in the Little Lost River system. The Little Lost River originates in headwater streams that drain the Lemhi Mountain Range from the north and the Lost River Mountain Range to the south. Portions of the Little Lost River Watershed traverse through Lemhi, Custer, and Butte counties in one of least populated and extremely isolated parts of central Idaho. The Little Lost River is one of several isolated streams such as the Big Lost River, Birch Creek, Medicine Lodge Creek, Beaver Creek, and Camas Creek in the northern part of the Snake River Basin that have no current overland connection to other streams in the Snake River Basin. These rivers and streams all individually "sink" into the large lava formations in the Upper Snake River Plain and are collectively referred to as the "Sinks Drainages" or "Lost Streams."

Because of the isolated nature of the Little Lost River bull trout populations, and the fact that these fish persist near the southern edge of the species' range, it is extraordinarily important from a biodiversity perspective to ensure long term persistence of bull trout in the Little Lost River system. Both the Draft Bull Trout Recovery Plan (DBTRP) and State fish management programs emphasize the importance of bull trout in the Little Lost River and its tributaries. Further, the DBTRP highlights the factors for species decline and current activities limiting recovery in the Little Lost River drainage, including inadequate streamflows and fish barriers associated with irrigation diversions located on key tributaries that block bull trout migration and access to spawning and rearing habitat located on Federal lands.

The rancher landowners in the Little Lost River drainage have made great strides in the past decade to accommodate the water quantity and quality needs of bull trout. Because of these efforts, and a tremendous group of agency biologists that have worked hard to get substantive work done on the ground, the Little Lost system is one of the bull trout recovery units where the light at the end of the long tunnel associated with ESA recovery is actually quite bright and growing stronger.

Trout Unlimited is currently partnering with Federal and State agencies to fulfill one of the primary information needs in the Little Lost system by completing a comprehensive fish barrier and diversion assessment. This work will be followed up by outreach to landowners to fix collaboratively any problems associated with existing diversion and ensure that such structures are properly screened and adequate fish passage provided for adult and juvenile fish.

Like the Pahsimeroi River, there are some tributary stream reconnect issues with which we must also deal. Also like the Pahsimeroi, there may be some complex State water law issues that need to be analyzed and creative streamflow transactions and strategies developed. However, current indications are that the pertinent landowners are willing to work with other stakeholders to fix those problems. Further, because the actual distance these streams have been historically dewatered is shorter than normal, the technical issues associated with the projects should not be as extreme as the earlier cited examples in the Pahsimeroi system. Trout Unlimited is committed to working with all of the stakeholders to ensure that these streamflow and habitat restoration activities occur.

Finally, while not specifically streamflow related there are land acquisition opportunities in the Little Lost River system that would guarantee conservation benefits both along the mainstem and on important tributaries like Wet Creek. These opportunities involve willing sellers, with the only question remaining being where the funding will come from. A timely influx of funding to the Little Lost system would effectively ensure that the aforementioned fish passage and screening, tributary stream reconnect and flow restoration, and land acquisition activities were successful, and a verifiable bull trout success story accomplished.

Project Funding and Conservation Group Participation

I'm going to issue a battle cry that has been heard early and often in the Columbia River Basin: We need a lot of money to get these projects done. Further, the need for money is not limited to asking for more, but also asking for a specific kind. We've certainly come a long way in recent years regarding funding opportunities for stream and habitat restoration projects. Federal funds provided via the Bonneville Power Administration, the Farm Bill, National Fish & Wildlife Foundation, or numerous other sources are incredibly helpful in terms of providing money for project development and completion. At the same time, direct appropriations to high priority areas where streamflow restoration is essential to species recovery would go a long way toward completing a multitude of expensive but necessary projects.

I'd also like to put a plug in for an expanded role for conservation groups such as TU in identifying and completing important streamflow restoration projects in high priority bull trout recovery areas. In light of how thinly spread most agencies

are in Idaho, and the fact that many of these project involve collaboration and substantial time spent on the ground with a multitude of landowners, there is a real role for groups willing to devote field time to getting to know the issues and communities in specific bull trout recovery areas. Further, many such groups have a proven track record when it comes to raising private funds for specific projects, an increasingly important factor when assessing the daunting task associated with both matching Federal funds and raising the additional money necessary to complete expensive and complex streamflow restoration and stream reconnect projects.

Conclusion

The State of Idaho, Federal resource agencies, and other stakeholders have made substantial progress in the past decade to assess and identify measures necessary to recover bull trout. Streamflow restoration projects are obviously one of the more difficult recovery measures in light of both the complexity of most projects and the historical lightning rod nature of water issues in the West. At the same time, TU believes that such projects are of the utmost important to recover the species. Further, we firmly think that such projects can be accomplished in an even-handed manner that benefits landowners and the rural communities where most bull trout populations exist.

OFFICE OF THE MAYOR,
City of Salmon, ID, August 25, 2003.

Senator MIKE CRAPO
304 North Eighth Street
Boise, ID 83702

Subject: IDAHO BULL TROUT HEARING

DEAR SENATOR CRAPO: The purpose of this letter is to provide input into the Bull Trout Hearing to be held in Boise, Idaho on August 26, 2003. Due to prior commitments, I am unable to attend the meeting but urge your strongest consideration of the contents of this letter during your deliberations.

The City of Salmon possesses the prime water rights for the Jesse, Chip and Pollard Creek drainages that are geographically located west of the City of Salmon. Chip and Pollard Creek diversions bring water to Jesse Creek that in turn flows directly into the City's water treatment facility. These water rights date back to 1867 and are the main sources of drinking water for the Salmon Community. Without conferring with local leaders, the Federal Government designated these drainages as potential Bull Trout habitation recovery areas. This designation as, you know, creates countless environmental management requirements that virtually prevent any man-made interference in the drainages without considerable cost.

As the prime water right bolder, the City of Salmon is not willing to accept these areas as Bull Trout habitation recovery areas. As mentioned, these drainages serve as the main source of drinking water for a growing community of 3,100 citizens and the City must be able to implement infrastructure construction projects without a costly and burdensome process that it cannot follow or afford. In addition, due to the extent of the City's water appropriations during the summer months, Jesse Creek is a "dry" drainage from four to 5 months, thus making it unsuitable for fish recovery. Finally, recovery operations would mandate a water CFS percentage through-flow that the City is not willing to exchange for its citizens' rights to their public drinking water system.

In closing, please consider Salmon residents' needs by ensuring that due diligence is conducted prior to making any decisions on drainages that affect our community. If you have any questions pertaining to this letter about the City's water rights or on our water usage, please feel free to contact me at (208)756-7285 or (208)756-3214.

Sincerely,

STANLEY B. DAVIS, *Mayor*
City of Salmon

STATEMENT OF THOMPSON CREEK MINING COMPANY

INTRODUCTION

Thompson Creek Mining Company ("Thompson Creek") hereby submits this statement to be published in the hearing record of the Senate Environment and Public Works Subcommittee on Fisheries, Wildlife and Water concerning Cooperation be-

tween U.S. Fish and Wildlife Service and the States on Bull Trout Recovery Under the Endangered Species Act.

The Thompson Creek Mine

The Thompson Creek Mine is located between Thompson and Squaw Creeks, both of which are tributaries of the Salmon River, in Custer County approximately 30 miles southwest of Challis. Since 1983, molybdenum ores have been mined from an open pit and milled into molybdenum concentrates for subsequent offsite processing. Thompson Creek molybdenum is used primarily in the production of alloyed steel, as a catalyst for production of petroleum products and petrochemicals, and as an additive to high performance lubricants. The mine and mill are located almost exclusively on patented land owned by Thompson Creek. The operation employs approximately 100 people on a full and part-time basis at compensation levels generally exceeding the Custer County average.

The Thompson Creek Mine is fully permitted by the Federal and State governments including, in particular, a permit issued by the Environmental Protection Agency ("EPA") under the National Pollutant Discharge Elimination System ("NPDES") of the Clean Water Act. Issuance of the NPDES permit was subject to consultation under Section 7 of the Endangered Species Act (ESA"). The most recent NPDES permit for the mine was issued on January 27, 2002; however, ESA consultation was not completed at that time and remains outstanding. Preliminary indications from the Fish and Wildlife Service (the "Service") are that consultation, when it is completed, will primarily concern potential impacts of the mining operation on bull trout.

The Bull Trout Listing Process

December 4, 1997. The Oregon Federal District Court ordered the Service to reconsider several aspects of the 1997 finding concerning listing of bull trout. The court directed the Service to: consider whether listing of the bull trout is warranted throughout its range; whether listing is warranted throughout the coterminous U.S. and, if the Service determines that listing throughout its range, or throughout the coterminous U.S. is not warranted, or is warranted but precluded, whether listing of the Coastal/Puget Sound DPS is warranted. The court subsequently directed the Service to prepare its response by June 12, 1998.

June 10, 1998. The Service published in the Federal Register a final rule to list the Klamath River and the Columbia River bull trout population segments as threatened under the Endangered Species Act and a proposed rule to list the Jarbridge River, Coastal-Puget Sound and St. Mary-Belly River populations segments as threatened under the ESA.

Since 1998 a great deal of new scientific evidence has become available for the bull trout species that was not considered during the listing process. Some of this data is reflected in the Bull Trout Recovery Plan and the Critical Habitat Designation, which were published and made available for public comment in late-2002 and early-2003. However, the recovery teams acknowledge that many additional uncertainties exist regarding bull trout population abundance, distribution and actions needed to protect and conserve the species. In the Salmon River Recovery Unit alone, 40 watershed biological assessments were completed by 2001 under Section 7 consultation, providing a description of baseline habitat and population conditions for this Recovery Unit and 72 projects were conducted for the Upper Salmon River Watershed Project since 1993 that benefit bull trout.

The ESA (16 USC §1531(c)(2)) states that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species. If States were allowed to implement recovery measures on a site-specific basis and tailored to each basin, bull trout populations would improve. For example, as indicated by Idaho Deputy Attorney General Strong, the Lemhi Model Watershed Project (a State/local cooperative effort) demonstrates what is possible when Federal agencies are willing to work with State and local interests instead of assuming a Federal solution is the best solution." There are numerous other cooperative efforts at the State/local level cited in the Recovery Plan.

TESTIMONY OF THOMPSON CREEK

1. *Thompson Creek supports the prior testimony of the Service to Congress that the Endangered Species Act is "broken" and that the critical habitat process consumes vast portions of the Service's resources while providing no correlative benefit*

In April 2003, Assistant Secretary of the Interior for Fish and Wildlife and Parks Craig Manson testified that the many court orders requiring critical habitat designations are undermining endangered species conservation by compromising the

Service's ability to protect new species and to work with States, tribes, landowners and others to recover those already listed under the ESA. Mr. Manson also emphasized that additional funding alone will not solve the long-term problem noting that two-thirds of the endangered species listing budget is being consumed by court orders and settlement agreements requiring designation of critical habitat for species already on the endangered species list. In most instances, designation of critical habitat provides little additional protection for endangered species.

Assistant Secretary Manson's assessment is certainly correct in Thompson Creek's case. In the Section 7 consultation for Thompson Creek's NPDES permit, the Service holds all the regulatory authority it requires to conduct the consultation and propose Reasonable and Prudent Measures to EPA by virtue of the bull trout's listing as a threatened species. Designation of critical habitat affords the Service no additional authority by which it can protect bull trout. Yet, the designation process for bull trout has consumed huge amounts of the agency's budget and available staff, as well as the resources of the regulated community. Even in this instance, the Service has designated Distinct Population Segments of such a magnitude as to be relatively useless to the regulatory process and inconsistent with the expressly stated objective of the ESA that management of threatened and endangered ("T&E") species should ultimately lead to delisting.

Congress should recognize that designation of critical habitat provides virtually no benefit to T&E species that does not presently exist as a result of the listing process while consuming significant portions of the Service's budget and staff availability. Allowing the Service to focus its staff time and other resources on protection of listed species under its existing authority would provide substantial benefit to T&E species and the objectives of the ESA. At the minimum, the Service should be granted express statutory authority to determine whether designation of critical habitat would meaningfully affect protection of a listed species and, therefore, whether the expenditure of agency resources is warranted.

2. *The Service should conduct the 5-year review required by the ESA*

Section 4 of the ESA, 16 U.S.C. § 1533(c)(2), required that the Service "conduct, at least once every 5 years, a review of all species included (on the list of T&E species) and determine on the basis of such review whether any such species should: (i) be removed from the list; (ii) be changed in status from an endangered species to a threatened species; and (iii) be changed in status from a threatened species to an endangered species." Thompson Creek supports the periodic review process and agrees with the State of Idaho that "new [scientific] information will augment the argument to break up the large Columbia River DPS ['Distinct Population Segments'] so that, ultimately, delisting can be achieved on a biologically reasonable scale.

3. *Distinct Population Segments should be sized to allow meaningful analysis and listing decisions*

The Columbia River Designated Population Segment is an example of the macro management style adopted by the Service with respect to bull trout. Section 3 of the ESA, 16 U.S.C. § 1532(5)(C), specifically states that, except in exceptional circumstances, the entire geographic area of a species should not be designated as critical habitat. The Columbia River DPS is one of the largest coverages in the United States, crossing many jurisdictional boundaries, diverse environments and habitats, as well as varied economic interests and industries. Moreover, the Service concedes that, within this DPS, there exists numerous thriving isolated populations and healthy fluvial populations of bull trout. The Service's own evidence thus suggests that the Columbia River DPS is not indicative of bull trout critical habitat. The fact that the recovery teams felt it necessary to breakdown the DPS into 22 Recovery Units with 141 distinct populations belies the macro management approach to bull trout recovery and conservation and devalues the benefit of State-based management activities.

Managing bull trout at the Recovery Unit level would allow for a more focused effort on populations that are weak and in need of protection. Thompson Creek agrees with the testimony of James L. Caswell, Administrator of the Idaho Governor's Office of Species Conservation that "smaller, more appropriate DPS units would allow for a more credible approach to the designation of critical habitat, to recovery, to direct limited resources, and ultimately to delisting". Most of the information provided in the Recovery Plan was based on a subpopulation designation as the basic unit of analysis; however, this approach was not carried through to the designation of DPS units or the recovery planning process. Thompson Creek's comments to the critical habitat designation, which were submitted to the Service on May 12, 2003, discuss this issue in detail and can be provided upon request.

4. *The Service's Recovery Plan should be required to recognize, incorporate and, where appropriate, defer to the State's numerous management plans and other programs to protect and conserve bull trout*

States need the ability to fully engage as an equal partner in the protection of bull trout and all listed species. Chapter 1 of the Recovery Plan acknowledges that many States have their own bull trout conservation plans. It further states that, in the eyes of the Recovery Team, these plans do not meet all the requirements of the ESA. However, the Recovery Plan and critical habitat designation ignore key elements of the ESA, particularly related to designation of DPS units and implementing management techniques that will more realistically protect the species and lead to delisting. The States included in the critical habitat designation have been managing bull trout and other native species for many years. Some of these programs are described below.

- Idaho 1995—appointed two committees, a policy and steering committee and a biology committee to prepare the Bull Trout Conservation Plan; 1996 draft plan available.
- Montana 2000—bull trout restoration plan adopted.
- Washington 1999—draft Bull Trout and Dolly Varden Management Plan; 2000 finalized plan.
- Oregon—management began in 1989 with final adoption of the native fish conservation policy in 2002.

Recovery teams must focus their efforts under the ESA in a manner that will directly benefit the species. The individual Recovery Unit concept can work if the scope is not so broad as to require infinite levels of protection at all points of the bull trout range. Indeed, bull trout can and should be managed as a catch-and-release game fish in much of its range. In contrast, the Recovery Plan not only fails to substantively incorporate the specific work of the States, but focuses on recovery measures applicable to the species as a whole and not to each Recovery Unit.

The recovery teams specified that each and every area of the bull trout range was essential or indispensable to the recovery of the species as a whole, and that the critical habitat was designated for all suitable habitats. The Service therefore designated thousands of miles of habitat throughout the Columbia River basin, irrespective of numerous thriving populations of bull trout, the differences in habitat and the often unwarranted cost of restoration. Finally, the public and stakeholders have not had an opportunity to review potential economic impacts associated with critical habitat designation, nor has the Service completed an economic analysis. If it retains the habitat designation process, Congress should mandate that critical

habitat designation include the economic impact analysis at the time of designation and that designation occur concurrently with issuance of a Recovery Plan. The Service's current piecemeal approach to these issues creates an expensive-to-prepare, time-intensive morass of information. Congress should make every effort to streamline implementation of the ESA.¹

In sum: (1) if the ESA process had been followed the bull trout listing would not yet have occurred and States would still be managing bull trout conservation; (2) if bull trout populations were managed in smaller, more biologically based increments, numerous populations could and should be delisted immediately; and (3) if the Service gave greater deference to State programs, conservation goals would be crafted to suit local conditions, not the one-level approach proposed by the centralized Federal Recovery Plan. (As a practical matter, the ESA must also recognize that a State-by-State management of species is politically necessary. So long as State game and fish agencies are responsible to State legislators or State commissions for enforcement of seasons, bag limits, harvest closures, and other management tools, then State programs should remain the first resort for management of T&E species.)

5. *Neither the Service nor Congress should place great reliance on the provisions that purportedly give parties regulated under the ESA additional flexibility or the Service's claim that it can and will engage in special rulemaking proceedings*

The ESA contains provisions related to Habitat Conservation Plans ("HCP"), 16 U.S.C. § 1539(a)(2), and the Service has issued a policy for so-called Safe Harbor Agreements. See 64 Fed. Reg. 32,717 (1999). Upon preparation of an approved HCP, the permittee receives not only an Incidental Take Permit, but also assurances that no additional mitigation will be required unless there is noncompliance with the

¹The Service should never be permitted to proceed as it has in the case of bull trout where the Recovery Plan preceded the designation of critical habitat (which did not include an economic impact analysis).

Permit. Under an approved Safe Harbor Agreement, a landowner who provides habitat improvements is authorized to subsequently take a T&E species to an agreed upon baseline by actions consistent with the permit.

Both HCPs and Safe Harbor Agreements are useful tools for parties regulated under the ESA. They do not provide a panacea, however, because the protection they provide is not absolute and the magnitude of effort and cost of preparing either of them is very substantial. Realistically, HCPs and Safe Harbor Agreements are primarily available to large-scale projects. They provide some flexibility to smaller applicants or smaller activities, but should not be viewed as a remedy for the over-designation of critical habitat.

Finally, the Service's suggestion that it would engage in a special rulemaking proceeding to seek the benefits of delisting a recovery unit in the existing Columbia River DPS, but not actual delisting, is improbable at best. Having proposed a bull trout DPS of this magnitude, and delisting criteria that simply cannot be met on a DPS-wide basis, there is no reason to think that the Service would undermine its approach to management of bull trout in the manner described in its written testimony. Moreover, in this event, the Service might well be sued by the same interests that compelled it to prepare habitat designations in the first place. Clearly, the remedy must be defined by Congress, not the Service's assertion that it might engage in an extraordinary rulemaking proceeding.

CONCLUSION

In summary, Thompson Creek believes that the Service possesses all of the statutory and regulatory authority it requires to effectively administer the ESA by virtue of listing species as threatened or endangered. By eliminating critical habitat designation, and thereby avoiding the inordinate expenditure of time and money incurred by the Service, State and local government and private parties, the objectives of the ESA would be better achieved and its impact on regulated parties would become more manageable. At the minimum, the Secretary should be empowered to determine if and when designation of critical habitat should be required. The Service's limited resources would be much better spent conducting the 5-year reviews required by the ESA, which could facilitate the statutory goal of delisting species where appropriate and focusing conservation and protective measures on those habitat areas most in need of improvement. In particular, Distinct Population Segments should be sized to have genuine management utility and to lead to delisting. The Federal Government's commitment of financial and other resources would also be maximized if it cooperated more directly with, and in many instances deferred to, existing State management programs. Finally, the existing regulatory tools set forth in the ESA and the policies of the Service are helpful, but are not a substitute for amendments intended to restore the statutory focus to conservation and protection of threatened and endangered species in the most significantly affected habitats.

Thompson Creek appreciates the opportunity to submit this testimony and would be pleased to provide any additional information or documentation upon request.

NEZ PERCE TRIBE,
Lapwai, ID 83540, September 9, 2003.

Hon. JAMES M. INHOFE, *Chairman,*
Committee on Environment and Public Works,
U.S. Senate,
Washington, DC 20510.

Re: Testimony on Cooperation Between U.S. Fish and Wildlife Service and the States on Bull Trout Recovery Under the Endangered Species Act

SENATOR INHOFE: On behalf of the Nez Perce Tribal Executive Committee (NPTEC), please accept the following testimony for the field hearing conducted by the Subcommittee on Fisheries, Wildlife, and Water held in Boise, Idaho on August 26, 2003. The Subcommittee explored different avenues for cooperating with the States on bull trout recovery. The Nez Perce Tribe would like to take this opportunity to remind the Committee that healthy bull trout populations are extremely important to the Tribe. Any Federal effort to vest management responsibility for endangered species recovery in the hands of the States must take into consideration four important principles: (1) the United States' trust responsibility to federally recognized Indian tribes such as the Nez Perce; (2) the treaty rights of the Nez Perce Tribe; (3) the Nez Perce Tribe's co-management authority over its treaty-reserved resources; and (4) previous and existing Federal recovery efforts for bull trout.

The Tribe urges the Committee to recognize the United States treaty and trust obligations owed to the Nez Perce Tribe. These duties are reflected in Secretarial Order #3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act. The trust responsibility encompasses a unique set of well established legal principles that the United States cannot delegate to the States. As the Committee is surely aware, the Nez Perce Tribe has a treaty right to harvest and manage fish, including the threatened bull trout.

In 1855, the United States negotiated a treaty with the Nez Perce Tribe, 12 Stat. 957. In this Treaty, the Tribe retained a reservation as a homeland and reserved other rights necessary for the cultural, religious, ceremonial, subsistence, and commercial survival of the Tribe. Article 3 of the 1855 Treaty explicitly reserved to Nez Perce Tribe certain rights, including the exclusive right to take fish in streams running through or bordering the Reservation, "the right to fish at all usual and accustomed place in common with citizens of the Territory; and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed lands." *Id.*

The Nez Perce Tribe originally had exclusive use and occupation of approximately 13.5 million acres in north-central Idaho, northeastern Oregon, southeastern Washington, and western Montana. As the Committee is surely aware, this area is proposed critical habitat for bull trout and is essential for this species' recovery. Similarly, the Tribe continues to exercise its treaty-reserved fishing rights within this area, which includes fisheries management.

The Tribe's co-management status is reflected by the Tribe's extensive involvement in fisheries management throughout the Columbia and Snake River Basins. Any recovery effort for endangered species would be incomplete without the expertise and participation of the Nez Perce Tribe. The Tribe must play a significant role in endangered species recovery, a role that properly reflects the Tribe's co-management status and that is consistent with Secretarial Order #3206.

As manager of its treaty-reserved resources, the Tribe is recognized for its efforts in restoring healthy, productive ecosystems. For example, the Tribe's Fisheries Department has a Watershed Division that is leading the subbasin planning efforts in the Clearwater, Lower Salmon, Hells Canyon, and Imnaha Subbasins—all of which are important to bull trout recovery. The Tribe's co-management status is also reflected in its Level II Agreement with the State of Idaho.

Finally, any new Federal efforts to cooperate with the States on the recovery of endangered species must take into consideration previous and existing efforts. The Service already drafted a recovery plan and has proposed critical habitat for bull trout. Despite the fact that the Service has limited funding available to complete these plans, the Tribe encourages the Service to not abandon these efforts or delegate responsibility to the States. The Nez Perce Tribe strongly supports the efforts of the Service to designate critical bull trout habitat and its recovery plan. See attached testimony of the Nez Perce Tribe Fish and Wildlife Commission.

With respect to bull trout recovery in Idaho, the Tribe has concerns with the legal and biological adequacy of the previous plan submitted by the State. See attached letters dated June 3, 1998. Previously, the Service rejected the State plan as inadequate for bull trout recovery. Further, the Environmental Protection Agency promulgated a bull trout water quality standard for temperature because the various State agencies could not agree on a protective standard.

In short, any locally led recovery effort must include full participation of the Nez Perce Tribe recognizing the Tribe's treaty-reserved rights and must include assurances that States will take all actions necessary to develop a legally and biologically sound recovery strategy.

Sincerely,

ANTHONY D. JOHNSON, *Chairman.*

NEZ PERCE TRIBE,
TRIBAL EXECUTIVE COMMITTEE,
Lapwai, ID 83540, June 3, 1998.

RON LAMBERTSON, *Acting Director,*
U.S. Fish and Wildlife Service,
Portland, Oregon 97232-4181.

Re: FAILURES OF THE STATE OF IDAHO'S "BULL TROUT CONSERVATION PLAN"

DEAR MR. LAMBERTSON: Healthy bull trout populations are extremely important to the Nez Perce Tribe. The Nez Perce Tribe has been closely monitoring the State of Idaho's attempts to implement its "Bull Trout Conservation Plan" in the Clearwater

Basin. As the attached letter indicates, the Tribe does not believe this Plan adequately protects and enhances bull trout.

The Nez Perce Tribe urges the United States Fish and Wildlife Service to recognize the United State's treaty and trust obligations to the Nez Perce Tribe, and uphold the Tribe's role as co-manager of this resource.

The Tribe remains committed to exercising its co-management authority to address the current status of bull trout and to protect and enhance bull trout populations. Please contact Dave Statler in the Tribe's Department of Fisheries Resource Management, (208) 476-4717, or Rick Eichstaedt in the Tribe's Water Resources Department, (208) 843-7368, if you have any questions.

Sincerely,

SAMUEL PENNEY, *Chairman*.

NEZ PERCE TRIBE,
TRIBAL EXECUTIVE COMMITTEE,
Lapwai, ID 83540, June 3, 1998.

The Honorable PHILIP E. BATT, *Governor*,
State of Idaho,
State Capital,
P.O. Box 83720,
Boise, Idaho 83720-0034.

Re: IMPLEMENTATION OF THE STATE OF IDAHO'S BULL TROUT ON RESERVATION PLAN
DEAR GOVERNOR BATT: Healthy bull trout populations are extremely important to the Nez Perce Tribe. The Nez Perce Tribe has been closely monitoring the State Division of Environmental Quality's implementation of the State of Idaho's "Bull Trout Conservation Plan in the Clearwater Basin . . ." The Tribe believes this Plan does not adequately protect and enhance bull trout. The following deficiencies are of concern to the Tribe.

The Plan fails to recognize the Nez Perce Tribe's treaty reserved fishing rights and the Federal Government's trust obligation to the Nez Perce Tribe. Federal law recognizes the Nez Perce Tribe as a co-manager of fisheries resources. Yet, the Plan relegates the Nez Perce Tribe to the position of a mere "stakeholder" in the process. Any Plan to protect and restore bull trout must recognize these legal principles and the Tribe's role as co-manager.

The Plan does not take the swift, unbiased action that is required to truly protect species. While a consensus-building process often serves a role in deciding policy, the Plan's process encourages stakeholders to politicize issues at the expense of the substantive, long-term protection and enhancement measures that bull trout will occur.

The Plan has numerous technical deficiencies. Instead of calling for quick and decisive actions, which protect and enhance bull trout persistence in their native range, the Plan calls for additional studies and the collection of additional data. Compliance with the Clean Water Act and the necessary habitat protection measures that are needed to protect salmon would also protect bull trout. Such measures are contained in the Tribe's recovery plan Wy-Kan-Ush-Mi Wa-Kish-Wit. Immediate, on-the-ground, action is required, especially in areas where the factors for bull trout decline are obvious. Additional studies to "verify" these causes needlessly stall recovery actions that need to be taken now.

The Nez Perce Tribe remains committed to exercising its co-management authority to address the current status of bull trout and to protect and enhance bull trout populations.

Sincerely,

SAMUEL PENNEY, *Chairman*.

STATEMENT OF JOE OATMAN, FISH AND WILDLIFE COMMISSION, NEZ PERCE TRIBE

Good evening, my name is Joe Oatman. I am a member of the Fish and Wildlife Commission of the Nez Perce Tribe. I appreciate the opportunity to share my thoughts with you today regarding protection of bull trout in the Inland Northwest.

Since time immemorial, Nez Perce people has occupied the area now known as southeastern Washington, northeastern Oregon, and much of central Idaho. Nez Perce people have and continue to use these lands to hunt, fish, gather, and graze their animals. The Treaty signed between the Nez Perce and the United States in 1855 specifically reserved the right for Nez Perce people to hunt, fish, gather, and graze animals both on and off the reservation. Fish, such as salmon, steelhead, and

various species of trout, serve an important role in Nez Perce diet, culture, and religion. For these reasons, the Nez Perce Tribe has devoted substantial resources toward the recovery of fish and fish habitat throughout the Snake River Basin.

The Nez Perce Tribe strongly supports the efforts of the Fish and Wildlife Service to designate critical bull trout habitat and its recovery plan. However, the designation of critical habitat is only as good as it is applied and enforced. Further, this effort is meaningless without an aggressive recovery effort. The Fish and Wildlife Service has estimated recovery for Idaho at \$7 million over 25 years. Based upon our experience with salmon and steelhead, I would imagine the amount will be much, much more.

Bull trout are an "indicator species." This means that healthy bull trout populations indicate healthy rivers and streams, which will support other native fish species, such as salmon and steelhead. Bull trout require clean and cool free-flowing waters. The protection and restoration

of bull trout habitat also aids the recovery of wild salmon, steelhead, cutthroat trout and other native species.

Recovery of species such as bull trout means examining a watershed from a ridge top-to-ridge top perspective and addressing all negative impacts to the species, including logging practices, mining, grazing, and other activities. This does not mean "shutting down the Forest", but rather making sure that the actions that do occur are planned in a way that will complement rather than hinder recovery. Recovery will entail replacing bad culverts, repairing or obliterating poorly designed Forest roads, and fencing streams on National Forest lands. These are projects the Nez Perce Tribe has and will continue to implement with its partners throughout the Basin.

I would like to remind the Fish and Wildlife Service to make sure to honor its treaty and trust obligations to the Nez Perce Tribe. The burden of bull trout recovery must not fall solely on the Tribe and tribal members through regulation and restriction of tribal fishery harvest. Secretarial Order 3206 on American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act clearly outlines the responsibilities of the agency in implementing its responsibilities when tribes are involved. This includes working with the Nez Perce Tribe on a government-to-government basis. The Fish and Wildlife Service must consider the impact of recovery actions on tribal cultural and religious practices. The Service should, also, continue to utilize the expertise of the Nez Perce Tribe by having tribal representation on its Recovery Teams.

Once again, we appreciate the efforts of the Fish and Wildlife Service in protecting bull trout and bull trout habitat. We hope as these efforts proceed that the Service will continue to seek dialog from members of the community, such as you are today, to make sure that the on-the-ground recovery makes sense and actually works.

STATEMENT OF THE BOISE PROJECT BOARD OF CONTROL ON DRAFT RECOVERY PLAN
FOR BULL TROUT (*SALVELINUS CONFLUENTUS*)

The U.S. Fish and Wildlife Service ("FWS or Service") has published a draft recovery plan for bull trout *Salvelinus confluentus*, and has solicited comments on this draft recovery plan. By notice published in the Federal Register February 15, 2003, the deadline for comments on the proposed recovery plan is March 29, 2003.

Boise Project Board of Control ("Boise Project") submits these comments on the draft recovery plan. The Boise Project will also be submitting comments on the critical habitat designation on or before the deadline of May 12, 2003.

As an initial observation and comment, the Boise Project objects to treating the draft recovery plan separate from the critical habitat designation. At the very least, the recovery plan should be considered jointly with the critical habitat designation and not establish a recovery plan without regard to what ultimately will be designated as critical habitat. Boise Project further objects to the procedure utilized by the Service in that the Service has failed to issue any economic analysis of either the draft recovery plan or the proposed critical habitat designations; as required by law. Without seeing the economic effects of the proposed recovery plan and the proposed critical habitat designation the Service cannot adequately assess the reasonableness of its proposed plan as required by law and it is more difficult for outside parties to make an informed comment on whether certain proposed actions are appropriate or inappropriate under the Endangered Species Act.

I. INTRODUCTION

A. Interests of the Boise Project Board of Control

The Boise Project Board of Control operates an extensive water delivery system on behalf of its five member irrigation districts: the Boise-Kuna Irrigation District, the Nampa & Meridian Irrigation District, the New York Irrigation District, the Wilder Irrigation District and the Big Bend Irrigation District.

The Districts operate the delivery and drainage system by a cooperative joint effort through the Board of Control. The Board of Control was created in 1926 when the Districts each entered into contracts with the United States of America. The Board of Control consists of representatives from each of the five Districts.

The Districts were created for the primary purpose of providing irrigation water to arid lands within their boundaries. Fulfilling this obligation, the Districts provide irrigation water for approximately 187,000 acres of farmland.

The Boise-Kuna Irrigation District was created by the Ada County Commissioners in 1925 for the purpose of developing, operating and maintaining irrigation facilities in the counties of Ada and Canyon in the State of Idaho. It has operated and maintained irrigation facilities since 1926. It contains approximately 49,000 acres.

The Nampa-Meridian Irrigation District is the oldest of the five irrigation districts. It was created by the Ada County Board of County Commissioners in 1904 for the purpose of developing, operating and maintaining irrigation facilities in the counties of Ada and Canyon in the State of Idaho. This District has operated and maintained irrigation facilities since 1905. It contains approximately 62,000 acres, of which approximately 40,000 are part of the Boise Project.

The Wilder Irrigation District was created by the Canyon County Board of County Commissioners in 1925 for the purpose of developing, operating and maintaining irrigation facilities in the State of Idaho. The District has operated and maintained irrigation facilities since 1926. It contains approximately 18,000 acres.

The New York Irrigation District was created by the Ada County Board of County Commissioners in 1926 for the purpose of developing, operating and maintaining irrigation facilities in the County of Ada in the State of Idaho. This District has operated and maintained irrigation facilities since 1926. It contains approximately 18,000 acres.

The second oldest of the five, Big Bend Irrigation District, was created by the Circuit Court of the State of Oregon for the County of Malheur in 1918 for the purpose of developing, operating and maintaining irrigation facilities in the County of Malheur in the State of Oregon. This District has operated and maintained irrigation facilities since 1926. It contains 1,716.56 acres.

The Districts are governed by boards of directors elected by the members of individual districts pursuant to Idaho and Oregon law. To pay for the costs of delivery and drainage of water, the Districts assess their members.

B. The Boise River Reservoir System

The Boise River Reservoir System is composed of three Boise River reservoirs (Anderson Ranch, Arrowrock, and Lucky Peak) and an off stream reservoir (Lake Lowell and its related facilities, Diversion Dam and the New York Canal). The Bureau of Reclamation owns and operates the Anderson, Arrowrock, and Diversion Dam projects and facilities. The Bureau also owns the New York Canal, Lake Lowell and related distribution and drainage facilities. The Boise Project Board of Control operates and maintains these facilities under contracts between its five-member Districts and the Bureau. The United States Army Corps of Engineers owns and operates Lucky Peak Dam. The combined active storage of the five reservoirs is over a million acre feet of water. See Table.

Reservoir	Stream	Total Storage (acre—feet)	Active Storage (acres)	Surface Area	Construction Agency	Year of Completion
Anderson Ranch.	South Fork Boise River.	493,200	423,200	4,740	Bureau of Reclamation.	1950
Arrowrock	Boise River	286,600	286,600	3,100	Bureau	1915
Lucky Peak ..	Boise River	307,000	278,200	2,810	Corps	1954
Lake Lowell	Boise River (off stream).	190,100	169,000	9,840	Bureau	1908
TOTAL		1,276,900	1,157,000			

The Corps and the Bureau utilize and regulate the Anderson Ranch, Arrowrock, and Lucky Peak storage reservoirs as one multipurpose system for irrigation, flood control, recreation and minimum, stream flow. In 1954, the Districts all signed agreements with the United States modifying their contracts with the United States to permit joint operation of the reservoirs.

Day-to-day regulation of the Boise River Reservoir System requires coordination between the Corps, the Bureau, the Idaho Department of Water Resources, and the Boise River Watermaster, a representative of the State of Idaho elected by water users of the Boise River. The amount of water released depends upon the time of year, the amount of natural flow and storage water available, and the purpose of the release.

The Districts irrigate their lands primarily from water stored in Lucky Peak, Arrowrock, and Anderson Ranch Reservoirs on the Boise River and in Lake Lowell off of the Boise River. The United States Bureau of Reclamation holds the legal title to this water for the Districts. Pursuant to contracts with the Bureau of Reclamation, the Districts together have secured the right to approximately 669,000 acre-feet of space in the reservoirs for irrigation purposes and have equitable title to these water rights.

The Districts (except New York) own the Lucky Peak Power Plant Project, which generates hydroelectric power from a 101 MW facility located at the Corps' dam. The Districts also are licensees for a proposed hydroelectric project at Arrowrock Dam.

The United States transferred to the Board of Control the care, operation and maintenance of certain irrigation works constructed by the United States as part of the Arrowrock Division of the Boise Project and which serve all the Project lands within the Districts. These irrigation works include the Diversion Dam, the New York Canal (formerly the Main Canal), Lake Lowell (formerly the Deer Flat Reservoir), the Mora Canal, the Deer Flat Highline and the Lowline Canals, and the Golden Gate Canal. Altogether the Districts operate and maintain over 670 miles of canals and primary laterals and 178 miles of drains through the Board of Control.

Diversion of the irrigation water to Project lands begins at the Boise River Diversion Dam, located on the Boise River approximately seven miles southeast of Boise, Idaho. Water is diverted at Diversion Dam into the New York Canal. The New York Canal runs generally west forty miles to Lake Lowell. Lake Lowell Reservoir was constructed for irrigation purposes and is operated and maintained by the Districts through the Board of Control. The New York Canal feeds other canals, as does Lake Lowell, for the purposes of irrigating lands within the Districts. The Nampa & Meridian Irrigation District separately owns, operates and maintains the Ridenbaugh Canal to deliver water to a portion of its land.

Because the very existence of these irrigation districts and the Boise Project Board of Control is tied to the Boise River, the irrigation districts and the Boise Project Board of Control are intimately concerned with all attempts to regulate and control the manner in which water is used. The Boise Project Board of Control is directly concerned with how the Service attempts to administer the Endangered Species Act, both in a general sense and specifically how the Service's actions under the Endangered Species Act affects the water users on the Boise River.

II. LISTING OF THE BULL TROUT AS THREATENED UNDER THE ENDANGERED SPECIES ACT 63 F. R. 31647.

A. *The Service Must Conduct A Formal Status Review Of The Species*

The Boise Project notes that this species was formally listed as threatened on June 10, 1998, nearly 5 years ago. The Endangered Species Act requires the Service to conduct "at least once every 5 years, a review of all species" 16 U.S.C. § 1553(c)(2)(a). The Service is also required on the basis of that review to determine whether or not the species should be removed from the list. 16 U.S.C. § 1533(c)(2)(b)(i). The Service has failed to conduct this review of the bull trout listing within the 5-year period required by the ESA. Before preparing and issuing a recovery plan and critical habitat designation the Service should have, and was legally required to, determine whether or not the species should remain on the list in the first place. The recovery plan as well as the critical habitat designation should await a status review by the agency on the propriety of listing the species in the first place and continuing to list the species based on current information. A large amount of information has been collected on the range and distribution of the species since the listing efforts 5 years ago. This information needs to be updated and a new review of the status of the species must be made before a recovery plan and critical habitat designation can legally be established.

In the status review, the Service should examine the adequacy of existing regulatory mechanisms to protect the species more carefully. The statute requires the Service to review the State programs and provide written justification for the failure to adopt the State programs. 16 U.S.C. § 1533(i). The State of Idaho has had a bull trout plan since 1996. To the knowledge of the Boise Project, the Fish and Wildlife Service has never provided a written justification for disagreeing with the State of Idaho's bull trout plan, as required by law.

B. Existing Regulatory Mechanisms Are Adequate To Protect The Species

The listing decision significantly downplays the adequacy of existing regulatory mechanisms, which is an important factor in determining listing in the first place under 16 U.S.C. § 1533(a). The recovery plan notes, that at least in Idaho, most of the land where bull trout are known to exist and where the recovery plans are proposed are Federal lands. Those Federal lands are subject to the PACFISH and INFISH regulations and procedures. In addition, in Idaho, the Governor's bull trout plan also provides mechanisms for protection of bull trout.

The recovery plan should discuss what effects the existing regulatory mechanisms are expected to have on the recovery of the species. If recovery is expected to be achieved the recovery plan should simply adopt the existing regulatory mechanisms. If recovery is not expected, then the plan should specifically identify where the recovery plan efforts are deficient and recommend specific measures in specific recovery units to deal with the deficiencies in the existing plans. Instead, the recovery plan is written as though the existing regulatory mechanisms do not exist.

The Service's listing decision criticized Idaho's bull trout conservation plan because it failed to describe specifically how practices will be modified and failed to describe how both Federal agencies and private land owners will be "required" to institute bull trout conservation measures. 63 F.R. 31655. The bull trout recovery plan suffers from the same deficiencies. The plan has generalized descriptions of what activities or practices are believed to have cause harm to the species. However, the plan contains no description of how specific practices "will be modified." The recovery plan also contains no explanation of how Federal agencies and private landowners will be "required" to institute bull trout conservation measures. In fact, for the most part, many of the requirements in the recovery plan are stated in such a generalized fashion that it is impossible to determine the actual requirements that the plan is seeking to impose. For example, the plan requires "modifications" to dam and reservoir operations without specifying what are the required modifications. If the recovery plan is adequate with these general prescriptions, then it is improper for the agency to declare that the existing regulatory mechanisms are inadequate for lacking specifics.

III. COMMENTS ON CHAPTER ONE, INTRODUCTION, DRAFT RECOVERY PLAN

The Boise Project will comment on the general introductory chapter of the recovery plan and on Chapter 18, dealing with the Southwest Idaho Recovery Unit. By not commenting on the other chapters, the Boise Project implies no approval of those chapters.

1. Recovery Plan Fails To Account For Resilience Of The Species And Natural Recovery

The recovery plan does not adequately explain that the species is naturally recovering from previous attempts to extirpate the species made by Fish and Game Departments throughout the Northwest, including Idaho and Montana. These well-known efforts to protect game fish were a significant cause of the decline of the species. Yet, they are not adequately recognized in the recovery plan. The recovery plan fails to account for the rebound and recovery of the species resulting from bans on bull trout caught in ordinary angling practices. In the past, common practice was for the bull trout to be considered a "trash fish" and when caught would be discarded rather than returned to the stream. Educational programs have been underway over the last 5 years and signs have been posted throughout the basin, advising anglers of the need to avoid taking the bull trout. The recovery plan does not address the efficacy of these programs and how these programs have contributed to date to the recovery of the species.

2. The Recovery Plan Unfairly Links Recovery of The Species As a Whole To Recovery of The Species In Individual Recovery Units or Core Areas

The recovery plan contains a number of basins where the species are known to be in very poor condition, for example the Coeur d'Alene and Malheur Basins, and establishes a long range recovery plan that could take as much as fifty years for the species to recover in that basin. Even then, the recovery plan suggests that spe-

cies may never adequately recover in those basins. The recovery plan suggests that recovery will not be achieved until all units are recovered. The plan also seems to require meeting the recovery goals in virtually all recovery units, without regard to the health of the species as a whole. It is possible for the species to be in excellent condition as a species even though some areas and some habitat may not support thriving or a “recovered” population of bull trout. The plan improperly, illegally, and unfairly links the continued listing of the species to recovery in many individual areas rather than based upon the status of the species as a whole.

3. Recovery Plan Fails To Acknowledge That In Certain Recovery Units Recovery Has Already Been Achieved

Many of the units, for example in the Boise, Payette, & Salmon, the population exceeds the 1,000 individuals established as the level of concern for the population. In many of the units the population is stable or increasing. Nevertheless, the recovery plan set additional regulatory requirements for those areas where the species already exceeds the goals established for recovery and the species is stable or increasing. The recovery plan does not adequately justify imposing additional recovery measures in areas that meet or exceed the recovery goals.

4. The Recovery Plan Improperly Sets Recovery Goals Placed On Carrying Capacity of Potential Habitat

The recovery plan fish population objectives appear to have been established based upon looking at particular, as well as potential, areas of habitat and determining, based on unsubstantiated judgment calls, how many individuals that particular habitat would potentially support. The basis for these estimates and habitat carrying capacity is not explained. The outside world is essentially being asked to “trust” these judgment calls without being provided any basis for the decisions. Are they “drive-by” habitat surveys or something else? Bull trout are known to avoid habitat even in pristine, undisturbed areas that are thought to be suitable habitat for reasons that are as yet unexplained. It is inappropriate to establish theoretical carrying capacity of the system as a basis for “recovery” of the species. Not every section of suitable habitat will be able to maximize production of bull trout. If the maximum production of bull trout to the carrying capacity of some theoretical habitat is the goal, then delisting becomes impossible. Moreover, there is no scientific basis explained in the recovery plan for establishing a carrying capacity of particular stream segments, core areas, or recovery units.

5. The Recovery Plan Does Not Establish Objective Measurable Criteria

Recovery plans are required under 16 U.S.C § 1333(f) to have objective measurable criteria for removing the species from the list. Many of the criteria that are established throughout the recovery plan are vague and general and do not meet the statutory requirement for objective measurable criteria. There is also no yardstick for measuring the reasonableness of actions proposed. It simply seems to be based upon ad hoc determinations by various recovery unit team members without explaining why the chosen action is “reasonable,” what alternatives were considered, and why the alternatives were not selected.

6. The Recovery Plan Inappropriately Requires Stable and Increasing Populations Across The Entire DPS

By establishing a “stable” and “increasing” population goal as a minimum for recovery of the species, the recovery plan fails to acknowledge that in particular years and in particular areas that populations can fluctuate based upon natural conditions. For example, there will be good years for water and bad years for water; there will be drought and there will be temperature cycles based upon solar heating of the streams. None of these natural conditions that could result in cyclical population of the species are taken into account. Instead, the recovery plan appears to set a bar and states that if the species falls below the bar in a particular recovery unit then recovery of the species as a whole has not been achieved. This simply does not recognize good science or population ecology. Similarly, the recovery plan does not account for these natural events that affect water temperature and instream flow conditions such as snowfall, drought, and fires.

7. The Recovery Plan Errs By Requiring Recovery in All or Almost All of The Recovery Units

The recovery plan does not look at the health of the population as a whole. Instead it inappropriately requires recovery in individual recovery units without regard to the number of individuals in the species. For example, there could be literally hundreds of thousands of bull trout in the Salmon and Clearwater Basins yet, recovery can be denied under this plan for failure to achieve recovery in the

Malheur and Coeur d'Alene Basins recovery units, where the habitat is much less suitable for the bull trout.

8. The Recovery Plan Was Put Together Without Adequate Involvement of Resource User Groups

The Regional Director announced, when the recovery plan was released, that it was a collaborative effort involving the input of various interest groups, environmental groups and resource user groups. The recovery team for the plan as a whole and for Southwest Idaho did not include any of the water user organizations that are heavily dependant on the resources of the Boise and Payette Basins. These user groups have had no opportunity to review that data or be involved with the discussions that led to the establishment of the recovery units and the goals. The recovery teams should be reconvened with proper representation of affected user groups, who were shut out of the process entirely.

9. The Recovery Plan and The Critical Habitat Designations Inappropriately Take a Broad Sweep Seeking More Habitat Protection and Recovery Activities Than Are Necessary

According to comments from representatives of the Service at the public meetings, the goal of the Service in the recovery plan and in the critical habitat designation was to require far more action than is essential for the recovery of the species, expecting that individual comments would result in reductions of proposed critical habitat and in individual requirements of the recovery plan. It is inappropriate for the Service to take such an approach. The Service should exercise its best professional judgment of what was absolutely "essential" for the recovery of the species, rather than including in the recovery plan a wish list of what individual recovery team members thought might be nice to try to accomplish in a particular watershed. The ESA regulations require the secretary to focus on those principal biological and physical elements "within the defined area" as appropriate for critical habitat, and by extension recovery plans. 50 CFR § 424.12(b). Yet the recovery plan and critical habitat designations include all the occupied and much unoccupied habitat without the specific finding that unoccupied areas are essential for the recovery of the species, as required by the ESA. The plan makes no effort to exclude any area where the benefits of exclusion outweigh the benefits of designation of critical habitat, as required by 15 U.S.C. § 1533(b)(2).

10. Recovery Plan Overstates The Threat To The Species From Dams and Understates the Benefit of Reservoirs

The recovery plan mentions, only in passing, the benefits to the species resulting from the creation of reservoirs in particular basins such as the Boise River Basin. The reservoirs are acknowledged to be beneficial, yet the dams are asserted to be detrimental. In some instances the dams are asserted to be beneficial by protecting the species from invasive competitive species. The schizophrenia about the impact of the dams and reservoirs needs to be addressed more directly rather than condemning all dams as a cause of decline of the species.

11. The Recovery Plan Improperly Establishes Recovery Goals For Recovery Units Where Bull Trout Have Been "Functionally Extirpated"

The Recovery Plan (Chap. 1, p.13), acknowledges that the fish in the Coeur d'Alene Basin are "functionally extirpated." Yet, the Plan ties recovery of the entire species to meeting goals that could take fifty years or longer in the Coeur d'Alene Basin without regard to the status of the species as a whole or its status in other watersheds. The Service should reevaluate those areas where the species is "functionally extirpated" as areas to be dealt with in the recovery plan, particularly if those areas are to be the basis for refusing to delist the species when recovery goals are achieved in other areas.

12. The Recovery Plan Lacks Factual Support For its Claim of Impact From Small Scale Agriculture

The Recovery Plan (Chap. 1, p.19) asserts that small-scale agricultural practices have had a greater impact on the species than large hydro and flood control projects throughout the Snake River and Columbia Basin. There is no support within the record, at least none that is contained in the recovery plan, to explain that statement. If that statement is true, then the recovery plan must explain why there is such a focus on the operations of hydroelectric, flood control and irrigation storage projects as opposed to focusing its primary efforts on irrigation diversion screening and other similar measures.

13. The Recovery Plan Fails To Incorporate Other Section 7 Consultations.

The recovery plan mentions the FCRPS biological opinion, (Chap. 1, p. 34), but fails to discuss other consultations in the area. For example, the Service has consulted with the Bureau of Reclamation on the operation of its Upper Snake River projects and has also consulted with the Bureau of Reclamation on its Arrowrock Valve Rehabilitation Project. Undoubtedly, there are many other consultations. None of these consultations, nor the reasonable and prudent alternatives incorporated in those consultations, are discussed in the recovery plan. The recovery plan is unclear as to how its requirements are to be coordinated with the existing biological opinions.

14. The Recovery Plan Fails To Explain Its Basis For Adopting Recovery Measures For Existing Viable Populations

The recovery plan establishes a level of less than a thousand spawning adults where the population in a particular recovery area is considered to be at risk. (Chap. 1, p. 48). The recovery plan does not explain adequately why populations of greater than 1000 spawning adults are considered to be not at risk. There also is no explanation as to why those populations with sufficient spawning adults need a recovery plan in addition to the existing regulatory actions currently in place to protect the species in those areas. No explanation is provided as to why any recovery plan is necessary for populations that are not considered to be at risk.

15. The Recovery Plan Inappropriately Dismisses Artificial Propagation

The Recovery Plan (Chap. 1, p. 54) dismisses any possible use of artificial propagation without considering whether that method might be appropriate in particular areas where there is sufficient habitat but lacking sufficient numbers of spawning adults. The agency should reconsider the use of artificial propagation or transplanting in particular segments where sufficient habitat exists. The Endangered Species Act specifically authorizes the use of artificial propagation, yet this possibility is dismissed as out of hand in the recovery plan.

16. The Recovery Plan Provides Only Vague and General Suggestions Regarding Dam Operations

The Endangered Species Act requires a recovery plan to have objective and measurable criteria. When discussing dam operations, the recovery plan (Chapter 1, p. 63) mentions that change in operations of dams, in types of passage, and in methods to eliminate entrainment will have to be considered and incorporated into the plan. However, the recovery plan does not identify what kinds of changes in operations, what kinds of passage, and what kinds of methods are necessary to eliminate entrainment at any of the particular facilities throughout the recovery area. This vague and generalized requirement makes it impossible to comment on the requirements of the recovery plan with any specificity and violates 16 U.S.C. § 1533(f)(1)(b).

17. Undefined Habitat Protection Zones Should Not Be Established And Should Not Be Used To Prohibit Or Relocate Hydroelectric Facilities

The Federal Public Lands Property Management Section states that "habitat protection zones" will be established. (Appendix 1 to Chapter 1). The recovery plan does not identify what is meant by "habitat protection zones." The term is undefined in the statute, in the listing decision, in the recovery plan, and in the critical habitat designations. If the recovery plan is to implement such a thing as a "habitat protection zone," the recovery plan must identify what it is, the legal basis for establishing the zones, and define what kind of protection is intended to be included within the zone. The same section also indicates that it will require new hydro facilities be placed outside these undefined habitat protection zones. In some instances, it also requires relocation of hydro facilities outside habitat protection zones. There is absolutely nothing in this record, in the recovery plan, and anything associated with the recovery plan, to form a basis for requiring new hydro facilities to be placed or relocated outside any area that is inhabited or potential habitat. Such an effort would be an enormous burden on all new as well as existing hydro facilities and may preclude the development of any new hydro facilities in areas affected by the recovery plan, which is a large portion of the State of Idaho. This requirement must be eliminated from the recovery plan.

18. Recovery Plan Monitoring Is Not Adequately Tailored To Particular Threats

The recovery plan as a whole uses broad generic prescriptions for monitoring items such as water quality, fish, etc. The recovery plan appears to require these monitoring programs to be instituted on a more or less across the board basis. Any monitoring required in particular recovery units should be carefully tailored to the particular threat to the species. The most cost effective efforts to deal with the po-

tential risks can then be undertaken. For example, if predation from exotic species is the main problem in a recovery unit, there should not be imposed upon the resource agencies extensive water quality or dissolved oxygen monitoring unless those are specific threats in a specific recovery unit.

IV. BOISE PROJECT BOARD OF CONTROL COMMENTS ON THE BOISE RIVER SECTION OF THE SOUTHWEST IDAHO RECOVERY UNIT

In addition to the comments to the recovery plan as a whole, the Boise Project Board of Control has specific questions and comments concerning the portions of Chapter 18, The Southwestern Idaho Recovery Unit, that relate to the Boise River. As noted in the introductory section, the Boise Project Board of Control obtains its water for irrigation purposes from the reservoirs on the Boise River, particularly Anderson Ranch and Arrowrock. The Boise Project Districts are the largest space holders in those reservoirs and have an enormous stake in the operation of the reservoirs pursuant to contracts with the United States Bureau of Reclamation.

1. *The Southwest Idaho Recovery Plan Inappropriately Requires Expansion of The Species Into New Areas*

The Southwest Idaho Recovery Plan establishes, as one of the goals, expansion of the species into new areas currently not occupied. However, the plan also acknowledges that there is a diminishing risk to the species and that the population is already stable and increasing. Under those circumstances, it is not necessary in southwestern Idaho to artificially force expansion of the species range into new areas.

2. *Population in Lucky Peak Is Not Necessary To Achieve Recovery of The Species*

The recovery plan for Southwest Idaho establishes as a goal, and apparently a mandatory goal, establishment of a new population of bull trout in Lucky Peak. There is absolutely no showing in this record that a population of bull trout in Lucky Peak is necessary for recovery of the species in the Boise River or Southwest Idaho recovery units. Such a goal is particularly unnecessary for the recovery of the species as a whole. The goal of establishing a new population in Lucky Peak is in direct opposition and contrast to the requirements of the Service's biological opinion and the reasonable and prudent alternatives in that biological opinion regarding the Arrowrock Valve Rehabilitation Project. It also directly contradicts the listing decision for the bull trout. The listing decision for the bull trout in Lucky Peak held that bull trout entrained from Arrowrock Reservoir into Lucky Peak were lost to the population. 63 F.R. 31 658. The reason given was that there was inadequate spawning habitat for the species in Lucky Peak and in the tributaries into Lucky Peak, particularly Mores Creek. As a result of this decision, the United States Bureau of Reclamation is required to expend funds (and charge the irrigation districts) for costs associated with removal of the bull trout from Lucky Peak back into Arrowrock where they will have access to spawning grounds and will not be lost to the local population. Designating as a mandatory goal an establishment of a new population in Lucky Peak is in direct opposition to the requirements of the biological opinion, which required removal of the species from Lucky Peak in the first place.

3. *The Recovery Plan Fails To Consider The Valve Replacement Project At The Arrowrock Dam*

The recovery plan for the Southwest Idaho recovery unit contains no information whatsoever on the impact of the new valves at Arrowrock Dam. One of the major reasons for selecting the type of valves that were selected by the Bureau of Reclamation, in consultation with the Fish and Wildlife Service, was to reduce spill from Arrowrock into Lucky Peak so that entrainment of the bull trout would be reduced and eventually prevented. The valves installed were low-level valves, which are intended to prevent entrainment of the bull trout. The valves were selected with increased hydraulic capacity so that more water could be passed through the valves and less water would ever have to be spilled over the top of the dam, where the bull trout could be entrained. The U.S. Fish and Wildlife Service was instrumental in selecting that alternative and requiring activities of the Bureau of Reclamation in operation of this dam. However, in the recovery plan there is absolutely no mention made of how the Boise River System will be operated with the new valves in place once they are completed in the year 2004. A recovery plan that ignores the requirements of the Fish and Wildlife Service and the actions of the Bureau of Reclamation in response to those requirements is defective on its face.

4. Fish Passage Is Not Feasible At Arrowrock Or Anderson Ranch

The recovery plan is inconsistent in its treatment of fish passage at Anderson Ranch and Arrowrock Dams. These dams are extremely tall, Anderson Ranch is over 100 feet and Arrowrock is over 300 feet. No feasible method of fish passage, upstream or downstream, at these dams is identified. Nevertheless, there is some suggestion in the recovery plan that fish passage is appropriate at these locations. The recovery plan should specifically state that fish passage at these two locations is not feasible and is not part of the recovery requirements for the Southwest Idaho recovery unit.

5. The Trap and Haul Program At Lucky Peak Is Not A Fish Passage Program

The recovery plan suggests in several locations that the Bureau of Reclamation's trap and haul program at Lucky Peak Reservoir is an example of an appropriate fish passage technique. The trap and haul program was instituted at the demand of the U.S. Fish and Wildlife Service to prevent fish passage or to mitigate the passage of fish from Arrowrock down into Lucky Peak. It was not intended to provide the "connectivity" or passage that seems to be the goal of some portions of the recovery plan. To the contrary, the trap and haul program was required by the Fish and Wildlife Service so any bull trout that were entrained from Arrowrock into Lucky Peak would be returned to Arrowrock so that they would have access to appropriate spawning grounds. There is no showing in any of the scientific information that the bull trout in Lucky Peak are anything other than entrained from Arrowrock from past operations of the Arrowrock Dam.

6. There Is No Known Connection Between The Individuals In Upper Mores Creek And The Individuals In Lucky Peak

The United States Forest Service and the Fish and Wildlife Service have identified a possible small, isolated population of bull trout in Upper Mores Creek. There has been no showing of any connection between the population in Mores Creek and Lucky Peak. In fact, the habitat in between Lucky Peak and the Upper Mores Creek section has been so impacted by mining, road building, and other activities that it is unlikely to ever serve as adequate habitat for spawning or fish passage. There is no evidence that the Upper Mores Creek population is an adfluvial population. There has been no evidence that there is any connection between the Upper Mores Creek population and the population of the small number of fish that were entrained from Arrowrock into Lucky Peak. Under these circumstances, it is inappropriate to establish as a recovery goal connectivity between the Upper Mores Creek population and what little, if any, population will exist in Lucky Peak after the trap and haul program is completed at the conclusion of the Arrowrock Valve Rehabilitation Project.

7. There Is No Showing That Anderson Ranch and Arrowrock Dams Adversely Affect Bull Trout Populations

The Southwest Idaho recovery plan suggests (Chap. 18, p. 27) that Anderson Ranch and Arrowrock Dams adversely affect bull trout. However, there is no basis for that inference other than the simple conclusion that dams adversely affect bull trout. There is a stable and increasing population and diminishing risk to the species above Arrowrock and above Anderson Ranch. Also, Arrowrock and Anderson Ranch provide an extensive reservoir system with prey suitable for the bull trout, which would not exist if not for the Anderson Ranch and Arrowrock Dams.

8. Genetic Exchange Is Not A Reasonable Goal In The Southwest Idaho Recovery Unit

There is no reasonable possibility of genetic exchange between the Boise, Payette, and Weiser Rivers given the geographical relationship of these river systems. Yet, the recovery plan suggests that genetic exchange is a goal for the entire Southwest Idaho recovery unit. The recovery plan does not give any indication how there would be genetic exchange between these three river systems. Moreover, genetic exchange is not a reasonable goal for the populations segmented by Arrowrock and Anderson Ranch Dams. There is no feasible method of exchanging individuals or establishing connectivity between those populations. Likewise, there is no basis whatsoever of any kind of genetic exchange between the populations in Upper Mores Creek and any of the other segments of the Boise River Basin. The genetic exchange component of the recovery plan should not be a goal in the Southwest Idaho recovery unit.

9. The Recovery Criteria For The Species In The Southwest Idaho Recovery Unit Are Met And Additional Measures Required In This Plan Are Unnecessary.

The bull trout recovery criteria for the Boise River requires "at least 10,100 bull trout with 500 in Arrowrock, 5,000 in Anderson Ranch, and 100 in Lucky Peak."

As discussed elsewhere in these comments, there is no basis for establishing a core area in Lucky Peak and it is inconsistent with the Services prior actions concerning Lucky Peak. With respect to Arrowrock, the distribution and abundance section of this chapter (Chap. 18, p. 8) suggests that the number of individual adult bull trout in the reservoir is in the hundreds. However, in the Biological Opinion issued by the Fish and Wildlife Service regarding the Arrowrock Valve Rehabilitation Project in 2001, the Service stated that “the best estimates available indicate that there about 5,000–7,000 bull trout living in the Middle Fork Boise River Basin.” These best professional estimates utilized by the Fish and Wildlife Service in its biological opinion did not find their way into the recovery plan. The Service also concluded, in 2001, that the bull trout in the Boise Basin population was on an “increasing trend.” (Biological Opinion p.11). The Biological Opinion further concludes that the size classes and abundance of bull trout in both populations, Arrowrock and Anderson Ranch, are thought to be similar. The Biological Opinion further noted that both populations had headwaters in wilderness areas that provided protection for the species. With the species already meeting the recovery goals, and at levels well above the populations which are thought to be at risk in both Anderson Ranch and Arrowrock, it is inappropriate for the Service to conclude that any of the additional measures set forth in the recovery plan are mandatory or essential for the recovery of the species, as the recovery plan concludes.

10. *The Recovery Plan for Southwest Idaho Inappropriately Establishes Mandatory Tasks.*

According to the Southwest Idaho Recovery Plan at page 76, all items listed as priority No. 1, are actions that “must be taken to prevent extinction, or prevent the species from declining irreversible in the foreseeable future.” There is no showing that the existence of the Southwest Idaho Recovery Unit is essential to prevent extinction of the species or that any of these measures will have any quantifiable affect on the species as a whole. There is no connection between the individual items listed as mandatory actions necessary to prevent extinction and actual extinction possibilities of the species. They simply appear to be items that are high on individual wish lists, without regard to a demonstration that any of those items are “essential” to prevention of extinction of the entire species.

11. *The Upper Mores Creek Is Not Essential To Recovery Of The Species As A Whole.*

The recovery plan establishes as a mandatory priority task number 1.2.4 evaluating barriers to fish passage in Mores Creek and improving passage where necessary. There is no showing whatsoever that this small number of fish, which were only recently even detected, have any bearing on the recovery of the entire species. While this may be a laudatory goal, it cannot be a mandatory requirement for recovery of the species.

12. *Conservation Pools In Arrowrock And Anderson Ranch Dams Are Not Essential For The Conservation Of The Species.*

The recovery plan establishes at 1.4.1, a mandatory requirement that conservation pools be established in these two reservoirs. There is nothing in this record to establish that conservation pools are necessary to the survival of the species or that they are necessary to the survival of the bull trout in the Boise River. The record establishes that the bull trout populations are actually stable, increasing and at diminished risk without establishing formal conservation pools. Moreover, the cost estimate over 5 years for this project is set at \$198,000. There is no evidence in the record as to how this figure was estimated, why \$198,000 is an appropriate cost to establish conservation pools, or how those funds will be spent. There is nothing in the record to establish what conservation pools the Fish and Wildlife Service believes are necessary for the recovery of the species. This is a vague and immeasurable criterion. There is no economic analysis of the impact on the water users of increasing conservation pools and consequently decreasing their own water supplies.

13. *Structural And Operational Modifications Are Not Essential At Anderson Ranch And Arrowrock Dams For The Recovery Of The Species.*

The recovery plan at 1.4.2 states that operational actions and facilities necessary to prevent fish passage through the dams in the Boise River are essential to the recovery of the species. This is also a mandatory, priority No. 1 requirement. The plan recognizes that there is no evidence of entrainment at Anderson Ranch. The plan does not recognize the important changes underway at Arrowrock to prevent entrainment through the use of the new valves. What operational actions and what facilities necessary to prevent passage through the dams are not described. How can recovery be achieved if the operational actions and facilities necessary to achieve recovery are undefined? The cost of these measures is established at \$290,000 over 5 years. Yet, how those costs are determined and what those costs relate to are not

identified in the record. In addition, a high priority item is established, as task number 4.2.1, for prevention of barriers that inhibit movement of bull trout within the Boise River recovery subunit. Yet, at the same time, the agencies are required to establish operational actions and facilities to prevent movement of bull trout through the dams. These inconsistent requirements, both of which are mandatory, make it difficult or impossible to meet the recovery goals of the species in this basin.

14. Lucky Peak Is Not An Appropriate Core Area For The Species.

The goal of the Fish and Wildlife Service for the last number of years in the Boise River has been to move the populations of bull trout out of Lucky Peak into Arrowrock. Now, the requirement of the Southwest Idaho recovery plan, 5.5.2 and 5.5.3, established as a priority two items; establishment of a population in Lucky Peak and connectivity between Lucky Peak and Upper Mores Creek. These are, according to the plan, actions that "must be taken to prevent a significant decline in species population, habitat quality, or some other significant negative effect short of extinction." There is no showing in this record that any population in Lucky Peak is appropriate or essential to prevent any decline of the species.

COMMENTS OF THE BOISE PROJECT BOARD OF CONTROL ON PROPOSED CRITICAL HABITAT FOR BULL TROUT (*SALVELINUS CONFLUENTUS*)

U.S. Fish and Wildlife ("FWS" or "Service") has published a draft critical habitat designation for bull trout, *Salvelinus confluentus*, and has solicited comments on this proposed critical habitat designation. By Notice published in the Federal Register, February 15, 2003, the deadline for comments on the proposed critical habitat is May 12, 2003. In response, the Boise Project Board of Control ("Boise Project") submits these comments on the proposed critical habitat designation.

The proposed critical habitat designation acknowledges that the draft recovery plan was the principal basis for identifying proposed critical habitat for bull trout (Critical Habitat Designation p. 33). The designation further acknowledges that areas included under the draft recovery plan may not meet the statutory definition of "essential to the conservation of bull trout" and, therefore, the entire critical habitat designation would be subject to reevaluation based upon comments on the draft recovery plan. The Boise Project submitted comments to the Snake River office of the Service on the draft recovery plan. Because the critical habitat designation is dependant upon the draft recovery plan as the principal basis of the designation and because it appears that two separate offices of the Service are evaluating the recovery plan on one hand, and the Critical Habitat Designation on the other, the Boise Project attaches and incorporates by reference herein, the comments it submitted on the draft recovery plan. Those comments set forth, in detail, the interests of the Boise Project in the use of water stored in the Federal reservoirs on the Boise River, Arrowrock and Anderson Ranch, and will not be reiterated herein.

I. LISTING OF THE BULL TROUT AS THREATENED UNDER THE ENDANGERED SPECIES ACT, 63 FR. §31647.

As set forth in the comments submitted by the Boise Project on the draft recovery plan, the Service has not conducted its 5-year status review of the species, as required by the Endangered Species Act. 16 U.S.C. §1553(c)(2)(a). In addition, the initial listing decision failed to give appropriate weight to the existing regulatory mechanisms to protect the species. Before deciding to adopt additional measures such as the critical habitat designation and the recovery plans currently under consideration by the Service, the 5-year review of the status of the species should (1) carefully review the new information available about the abundance of the species, and (2) carefully review the existing regulatory mechanisms, as those regulatory mechanisms have been updated in the past 5 years. Until the 5-year status review is complete, the critical habitat designation cannot properly be completed, as what is critical to the recovery of the species necessarily requires an understanding of the current status of the species.

II. LEGAL REQUIREMENTS FOR DESIGNATION OF CRITICAL HABITAT

The Endangered Species Act (ESA) has two different tests for designation for critical habitat. One test is for designation of areas that are occupied by a threatened or endangered species. 16 U.S.C §1532(5)(a)(i). A separate test exists for designation of habitat that is not occupied by the species at the time of listing. 16 U.S.C §1532(5)(a)(2). For an occupied area to be designated as critical habitat, it must be an area which contains the physical or biological features essential to the conservation of the species, and be an area which may require special management consider-

ations or protection. Areas unoccupied by the species at the time of listing require a determination that those unoccupied areas are essential for the conservation of the species.

The term “essential” is not defined in the statute. However, the common meaning of that word is “indispensable” or “necessary.” See, American Heritage Dictionary of The English Language. The term “conservation” is defined in the ESA to mean, essentially, “measures necessary to recover the species to a point where it is no longer in need of protection under the Endangered Species Act” or, in shorthand, recovery.

16 U.S.C. §1532

Consequently, for an area to be designated as critical habitat, it must be indispensable to the recovery of the species. In addition, the statute places a further requirement on the Service before an area can be designated as critical habitat. The ESA requires that the critical habitat designation must be based on the best scientific information available and “after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.”

16 U.S.C. §1533(b)(2)

Some environmental advocacy groups have criticized the Service in the past for failing to limit its consideration to purely biological factors when proposing critical habitat designations. Indeed, at the public hearings held in Boise, Idaho, representatives of certain environmental interest groups stated publicly that the Service was prohibited from taking into consideration economic and social impacts under the Endangered Species Act in its critical habitat designation. That argument is legally wrong and flies in the face of the clear requirements of the statute. In addition, some FWS employees have expressed discomfort with being asked to make economic and social decisions, which they are constrained to make, because they lack the adequate background and training to make economic and social decisions. Yet, to comply with the law, that is exactly what must be done. The Service must include persons qualified in economic and other impact analysis before it can make any reasonable proposed critical habitat designation. It does not appear that this necessary component of any critical habitat designation has been included in this proposal.

In addition, the Service’s own regulations recognize that, in designating critical habitat, a balancing should be undertaken between the benefits of exclusion against the benefits of inclusion of any particular area as critical habitat. Once the Service concludes that the benefits of excluding an area would outweigh the benefits of including the area in critical habitat, then the Service must exclude that area, unless the Service finds that excluding the area would result in extinction of the species. 50 CFR §424.19.

Finally, no designation of critical habitat for areas that are currently unoccupied by the species can be made without a specific finding that those areas are essential to the conservation of the species. No such findings have been made and, given the wide distribution of the species, no such findings would be legally or biologically appropriate.

III. THE CRITICAL HABITAT DESIGNATION IS NOT BASED ON THE DETERMINATION OF AREAS THAT ARE ESSENTIAL TO THE CONSERVATION OF THE SPECIES.

1. *The recovery plan did not attempt to determine which particular habitat areas were essential for the conservation of the species.*

The critical habitat designation admits that the critical habitat proposal principally relies upon the recovery teams’ recommendations in the draft recovery plan for each recovery unit as the basis for designating critical habitat in that particular area. However, the recovery teams did not focus on determining what was essential or indispensable to the recovery of the species. Rather, the recovery teams viewed their charge as identifying measures in their particular basin or recovery unit which would respond to the generic threats to the species identified in the listing package, and identifying areas which were or could be occupied by the species. Thus, for example, where the listing package identified habitat fragmentation due to dams, the recovery team in the southwest Idaho unit understood that its obligation was to identify measures that would deal with a habitat fragmentation in the southwestern Idaho unit associated with the existence of dams.

Similar determinations were made with respect to mines and road building and other potential threats to the species identified in the listing package. The recovery team did not attempt to identify those areas that were essential or indispensable to the recovery of the species. Nor did the recovery team view its charge as proposing only those recovery measures that were essential to the recovery of the species as a whole. Each recovery team operated in a vacuum, looking at measures that would benefit the species in its particular area.

Moreover, in designating particular occupied and unoccupied areas, the recovery team looked to the potential carrying capacity of the habitat as a basis for identifying where the species would or could exist. Again, there was no correlation between those areas identified by the recovery team as good or suitable habitat and a decision that those areas were essential or indispensable to the recovery of the species. Yet the critical habitat designation assumes that all the areas identified as suitable for the species must be designated as critical to the recovery of the species.

Consequently, the recommendations of the recovery teams were made for a completely different purpose, and aimed at different goals, than the critical habitat designation. This is no criticism of the recovery team. They have made some useful recommendations for habitat improvements in their respective recovery units. However, as the principal basis for determining that areas are critical habitat for the species, the critical habitat designations cannot properly rely upon the recommendations of the recovery team for what actions can be undertaken to improve habitat in general, or areas where the species currently exists, or areas where the species can be expanded.

IV. THE CRITICAL HABITAT DESIGNATIONS ARE UNLAWFULLY BROAD BY UNCRITICALLY INCLUDING ALL ISOLATED POPULATIONS AND THE SOUTHWEST IDAHO ISOLATED POPULATION SHOULD NOT BE INCLUDED AS CRITICAL HABITAT FOR THE SPECIES

The recovery teams have identified areas where actions can be taken to enhance habitat conditions for bull trout and areas where bull trout either now exist or can be induced to exist in a particular recovery unit. However, the Service has failed to make a determination of which of the many different areas are essential or indispensable to the recovery of the species. As an example, the Southwest Idaho Recovery Unit is completely isolated from the remaining bull trout populations. Bull trout in the Southwest Idaho Recovery Unit have no ability to connect to other populations, not simply because of dams and other obstructions in the river, but because the Lower Boise River does not meet the basic habitat requirements for bull trout. The water is simply not cold enough to provide adequate bull trout habitat. No corridor can be established for the Southwest Idaho population to connect with other populations. Consequently, the Service has, in the Southwest Idaho Recovery Unit for the Boise River, identified an isolated population as essential to the recovery of the species as a whole.

No finding in either the recovery plan or the critical habitat designation justifies a determination that this population, or any other of the isolated populations of the species, is essential to recovery of the species. The proposal contains no finding that the species would become extinct or that it would or would not fully recover, whether or not it existed in the Boise River or the Southwest Idaho Recovery Unit.

There are many thriving populations of bull trout in the Salmon and Clearwater drainages in Idaho, and in other drainages in Montana and Washington, with substantially greater connectivity to other subpopulations. Those core populations ought to be examined and a determination made whether protection of those core populations would be adequate to ensure the survival of the species. The peripheral populations, such as the southwest Idaho population, the Malheur River population, and the North Fork of the Coeur d'Alene population, must be examined and a determination must be made as to whether that population is essential to the recovery of the species. From the information available, these peripheral populations, including those in the Boise River, are not essential to the recovery of the species. Therefore, these isolated and peripheral areas should not be designated as critical habitat for the species.

V. THE CRITICAL HABITAT DESIGNATION FAILS TO INCLUDE THE REQUIRED ECONOMIC ANALYSIS OF THE DESIGNATION

Section 4 of the ESA requires the Service to designate critical habitat only after taking into consideration the economic impact of the designation of a particular area as critical habitat. 16 U.S.C. §1533(b)(2). The proposed designation acknowledges that obligation. Critical Habitat Designation, p. 320–321. No economic analysis has been completed and released to the public for comment concerning the decision to designate any particular area or areas as critical habitat. Without the required economic analysis, it is difficult or impossible for the public and affected stakeholders to adequately and effectively comment upon the economic impact of designating or not designating a particular area as critical habitat. However, some general observations can be made concerning the proposals for the Boise River.

The Boise Project includes the major space holders in the Arrowrock and Anderson Ranch Reservoirs on the Boise River which are managed and operated by the United States Bureau of Reclamation. To come to a conclusion about the economic

impact of designating these reservoirs as critical habitat, an understanding must be reached of the direct and indirect impacts that the designation of those areas as critical habitat may have. See 15 USC §1533(b)(8) and 50 CFR §424.19. These provisions require a brief description of the activities that may be affected by the critical habitat designation. Yet, the proposed critical habitat designation does not describe the potential impacts of the designation on the operations of the Boise River reservoirs.

The Bureau of Reclamation has chosen to consult with the FWS over its ongoing operations at these facilities. The Bureau of Reclamation has also been required to consult on the installation of the Arrowrock Valve Rehabilitation Project. The Bureau of Reclamation selected a far more expensive alternative for rehabilitation of these valves than was originally proposed. One of the reasons for the additional cost associated with the valves selected by the Bureau was to preclude entrainment of the bull trout from Arrowrock into Lucky Peak. The Bureau has not provided cost estimates to the Boise Project concerning these additional costs associated with the measures to protect the bull trout, so the Boise Project cannot provide precise costs. However, the Boise Project does pay a significant portion of the Operation and Maintenance costs of the Arrowrock and Anderson Ranch facilities on an annual basis and does pay for these types of modifications to the structures. The Boise Project irrigation districts, as the primary space holders behind Anderson Ranch and Arrowrock, also stand to lose water if the Service concludes that additional water must be retained in the reservoirs and not delivered to the irrigators. If that is a possible or intended result of the designation of those reservoirs as critical habitat, it should be identified. The cost associated with the proposal to designate these areas as critical habitat, and to provide additional controls on the operations of the Bureau of Reclamation to deliver the water belonging to the Boise Project irrigation districts to those districts, must be taken into consideration. No attempt has been made in the critical habitat designation to make such a determination or to consider such costs.

When such a balancing of the associated costs, compared with the benefits, is ultimately undertaken, the Boise Project is confident that the reservoirs on the Boise system will not be included as critical habitat. The draft recovery plan acknowledges that the populations in the Boise River, above Arrowrock and Anderson Ranch, are in good shape, even while the reservoirs are currently being operated for the purposes for which the reservoirs were originally designated, i.e. delivery of irrigation water. If the population is in good shape with the current management plan in place, why is it necessary to designate these reservoirs as critical habitat, impose additional restraints on those reservoirs, and cause economic dislocation to the irrigators who rely upon the delivery of that water?

Similar economic analysis must be considered not only for the Boise River, but for the other areas throughout the entire Columbia River Basin that have been designated as critical habitat. Until that economic analysis is complete, and the public has had a chance to review that economic analysis, no critical habitat designation can legally be made. See, *New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001).

VI. THE CRITICAL HABITAT DESIGNATION IS DEFECTIVE BECAUSE IT FAILS TO CONSIDER OTHER RELEVANT SOCIAL IMPACTS OF DESIGNATION OF CRITICAL HABITAT

Not only does Section 4 of the Endangered Species Act require consideration of economic impacts of designation, the statute also requires "consideration of other relevant impact." 16 U.S.C. §1533(b)(2).

The Service's rules also require the Service to identify the significant activities that would be affected by designation of critical habitat and the impact of the designation of critical habitat on those areas. 50 C.F.R. §424.19. The critical habitat designation in general, and in the Southwest Idaho Recovery Unit in particular, does not identify those activities that may be affected by critical habitat. Consequently, it makes no determination of the impact of those activities from the designation of critical habitat. Without these two important components, the critical habitat designation cannot be sustained.

The "other impacts" analysis should also recognize that Congress authorized the Arrowrock and Anderson Ranch reservoirs on the Boise River for irrigation storage. The irrigation districts which make up the Boise Project and the other space holders in the reservoirs have repaid the costs of construction of those dams. The Boise Project irrigation districts own equitable title to the water rights in the reservoirs. *Ickes v. Fox*, 325 U.S. (1937). The impact of attempting to alter those pre-existing legal requirements, and the constraints those legal rights have on designating critical habitat, must be considered before a final decision can be made.

In addition, the reservoirs on the Boise River and the Payette River in the Southwest Idaho Unit are used extensively for recreation. Designating those Boise River reservoirs, Lucky Peak, Anderson Ranch, and Arrowrock, as critical habitat as proposed in the designation, may have an effect on recreational use on those reservoirs including fishing, boating, camping, and other streamside activities. The designation does not indicate how those activities will be affected. It is possible that recreational activities could be affected. For example, in portions of the Salmon River, rafting is prohibited due to the presence of spawning activities of certain anadromous fish. The real impacts to recreational, fishing and other uses of the Boise River system must be identified and quantified before a decision can be made to include that particular area as critical habitat. Because that has not been done, no lawful critical habitat designation can be made.

VII. THE CRITICAL HABIT DESIGNATION HAS FAILED TO WEIGH THE BENEFITS OF EXCLUSION OF AREAS FROM CRITICAL HABITAT AGAINST THE BENEFITS OF INCLUSION

In designating critical habitat, the Service is also required to examine particular areas after economic and other impact analyses have been completed. Furthermore, the Service is required to determine whether or not a particular area would best be left out of the critical habitat designation due to the magnitude of the impacts, compared to the benefits to the species, of including that particular area as critical habitat. No attempt has been made in the critical habitat rule to conduct that analysis by the Service. Until economic and other required impact analyses have been completed, such a weighing of benefits of inclusion and exclusion cannot be completed.

However, the Boise Project suggests that the Boise River reservoirs should be excluded from critical habitat because the benefits of including those reservoirs would clearly be outweighed by the economic and other social effects and impacts of designation. For example, no special management ought to be necessary for the operation of those reservoirs because the population in the Boise River above Arrowrock and Anderson Ranch is in good condition. No additional benefit to the species has been identified by designating the Boise River reservoirs as critical habitat. On the other hand, there are significant potential economic and other impacts to the operations of the reservoirs which could severely limit the benefits of the reservoirs for the purposes for which they were built; i.e., irrigation in the case of Arrowrock and Anderson Ranch, flood control as in the example of Lucky Peak, and other recreational benefits for which the reservoirs have been secondarily operated by the Bureau over the years. Even without conducting an extensive economic analysis, it is apparent that no benefit to the species has been identified by listing the Boise River reservoirs as critical habitat, so no critical habitat designation is appropriate for those areas.

VIII. THE CRITICAL HABITAT IS FLAWED BECAUSE IT FAILS TO MAKE A DETERMINATION WHETHER THE UNOCCUPIED AREAS DESIGNATED ARE ESSENTIAL TO THE CONSERVATION OF THE SPECIES

Both the ESA and the regulations require the Service to make a finding that unoccupied habitat that is designated must be critical or indispensable to the recovery of the species. 16 U.S.C. §1532(5)(a)(ii) and 50 C.F.R. §424.12(e). The statute further recognizes that critical habitat shall not include the entire geographic area which can be occupied by the species. 16 U.S.C. §1532(5)(C).

In the critical habitat designation, the Service has proposed including a number of areas that are currently unoccupied. The Service has made no finding or determination that these areas are essential or indispensable to the recovery of the species.

For example, in the Southwest Idaho Recovery Unit, the Service proposes designating Lucky Peak Reservoir and Mores Creek as critical habitat. The Service has made no determination that including these areas is critical or essential to the recovery of the species.

The bull trout in Lucky Peak are there as a result of entrainment from the past operations of Arrowrock Reservoir. See, Biological Opinion for Arrowrock Valve Rehabilitation Project issued to the Bureau of Reclamation and Biological Opinion for the Operation of Upper Snake River Projects issued to the Bureau of Reclamation by FWS. Those Biological Opinions declared that it was necessary for the Bureau of Reclamation to trap and haul the bull trout out of Lucky Peak and move them back into Arrowrock because the bull trout, once they were entrained below the Arrowrock dam, had no suitable spawning habitat. Essentially the bull trout in Lucky Peak are stranded individuals and are not a separate population. Moreover, the Bureau of Reclamation is operating under a requirement in the biological opin-

ion to remove those fish from Lucky Peak and move them into Arrowrock Reservoir. Consequently, Lucky Peak is unoccupied habitat. Additionally, Mores Creek has been impacted by mining operations in the 1860's and is simply not a suitable habitat for the species.

To list Lucky Peak and/or Mores Creek, the Service must have made a finding that those areas are essential to the conservation of the species. No such determination was made, nor can any such determination be made. The draft recovery plan recognizes that only a very small and isolated population could possibly be sustained in Lucky Peak and Mores Creek, and only with substantial costs associated with habitat improvement in Mores Creek. Under those circumstances, Lucky Peak Reservoir should not be listed as critical habitat for the species.

IX. THE CRITICAL HABITAT DESIGNATION IS FLAWED BECAUSE NO SPECIAL MANAGEMENT PLANS OR PROTECTIONS ARE INCLUDED IN THE DESIGNATION

The Endangered Species Act defines the term "critical habitat" carefully. For areas occupied by the species, it is those portions of the geographic area which have physical or biological features that are both essential to the conservation of the species and "which may require special management considerations or protections." 16 U.S.C § 1532(5)(a)(i). The critical habitat designation has made no effort to identify which areas in the geographic areas occupied by the species may have particular physical or biological features that require special management considerations or protection. Until that determination is made, the Service can properly make no critical habitat designation.

As it relates to the Southwest Idaho Recovery Unit, there has been no showing that the physical or biological features of the Boise River irrigation storage reservoirs require any special management considerations. The population is doing well, despite years of efforts to extirpate the fish as a competitive game fish and/or to cast aside fish that may have been inadvertently caught by anglers looking for game fish. Despite these efforts, the population in the Boise is in reasonably good condition according to the draft recovery plan, and according to the information about the species that has been collected by the Bureau of Reclamation. No special management plan for the operation of the reservoirs has been identified as necessary for the conservation of the species. Consequently, no critical habitat designation can properly be made for the Boise River reservoirs, including Lucky Peak, Anderson Ranch, and Arrowrock.

X. ARROWROCK, ANDERSON RANCH, AND LUCKY PEAK RESERVOIRS SHOULD NOT BE LISTED AS CRITICAL HABITAT

Even if it were appropriate to include the Southwest Idaho Recovery Unit in the critical habitat, and even if it were appropriate to include portions of the Boise River within the critical habitat for the reasons expressed above, there is no justification for including the Arrowrock, Anderson Ranch or Lucky Peak reservoirs in the critical habitat designations for a species which occupies thousands of miles of habitat throughout the Columbia River basin. The impacts are potentially severe, the benefits few or nonexistent.

XI. THE DESIGNATION OF CRITICAL HABITAT IN RESERVOIRS CAN NOT BE EXTENDED TO INCLUDE FULL RESERVOIR POOLS

The proposed critical habitat designation contains a suggestion that critical habitat includes all habitat in a full reservoir pool. That suggestion is found at page 50 of the Draft Critical Habitat Designation, which states "Critical habitat extends from bankfull elevation on one side of the stream channel to the bankfull elevation on the opposite side." That section also states that where there is doubt about the bankfull elevation, then the Corps of Engineers' high water mark should be used. For reservoirs and lakes the lateral extent of critical habitat is defined as the perimeter of the lake or reservoir on standard maps. Standard maps typically utilize the full pool to show the perimeter of the reservoir. The Boise Project doubts that the Service intended to require full pools as critical habitat and at least in the Boise River and Southwest Idaho Recovery Unit, such a designation would be clearly erroneous. Indeed, the draft Recovery Plan for the Boise River and the Biological Opinions for the Bureau of Reclamations activities in the Boise River reservoirs have concluded that reservoir elevations necessary to protect and enhance the species are unknown.

The reservoirs in the Boise River and throughout the Southwest Idaho Recovery Unit are irrigation storage and flood control reservoirs. If the full pool is defined as critical habitat, then by definition there is "harm" to the species by altering the critical habitat, i.e. the full pool. To require those reservoirs to be maintained at full

pool would defeat the very purpose of the reservoir. The definitions of the extent of critical habitat as it applies to reservoirs must be changed to make it clear that critical habitat does not mean the full reservoir pool and does not require maintenance of full reservoir pools to avoid harm to the species and harm to critical habitat.

XII. THE BOISE PROJECT JOINS IN THE COMMENTS SUBMITTED BY THE IDAHO WATERS
USERS ASSOCIATION

The irrigation districts which make up the Boise Projects are members of the Idaho Water Users Association. They have reviewed and join in the comments of the Idaho Water Users Association filed with the Service on the proposed critical habitat designation.

